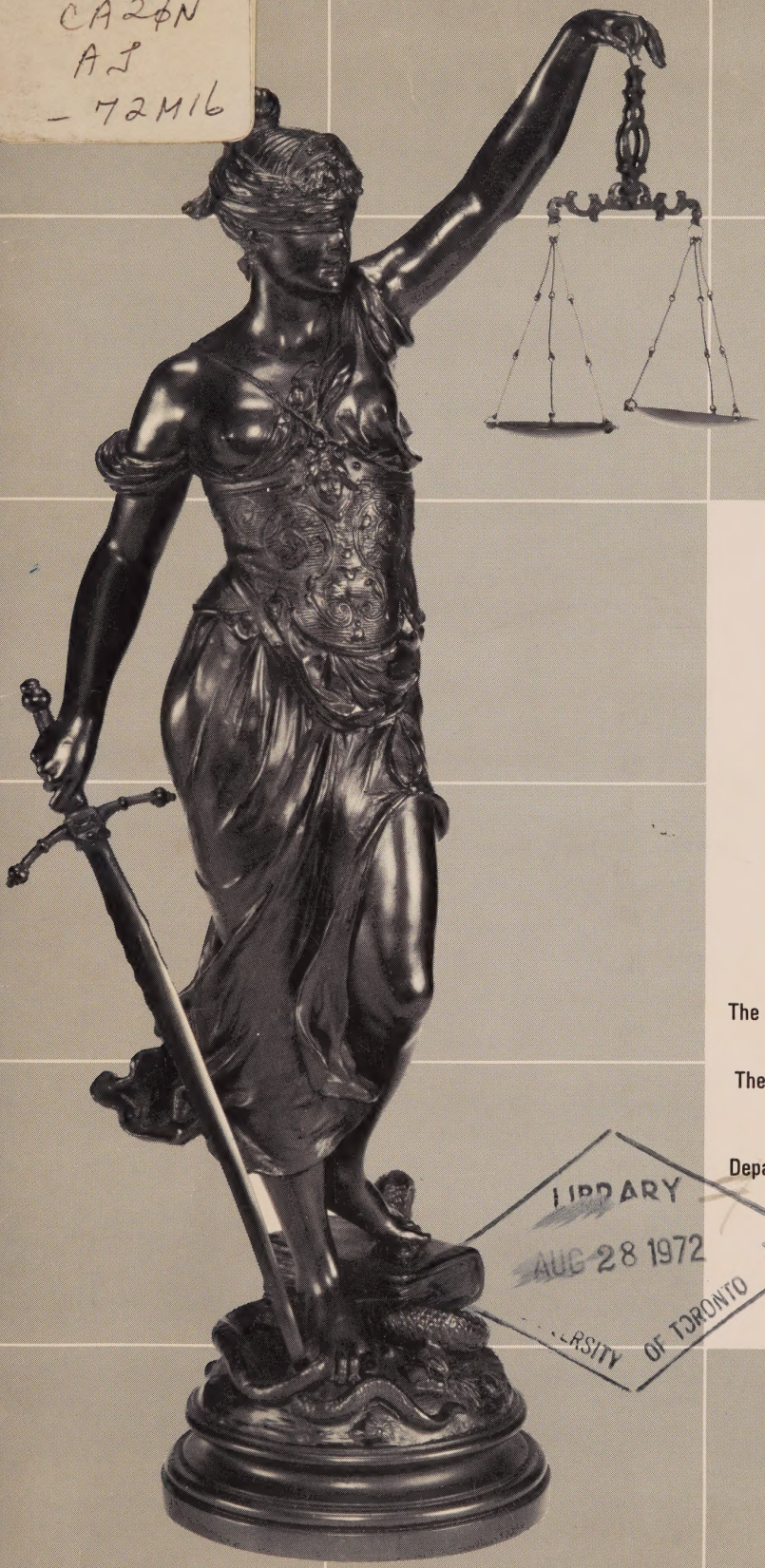

ONTARIO

MANUAL OF PRACTICE

ON ADMINISTRATIVE LAW
AND PROCEDURE IN ONTARIO

under

The Statutory Powers Procedure Act, 1971
The Public Inquiries Act, 1971
The Judicial Review Procedure Act, 1971
and Related Statutes

Department of Justice & Attorney General
February, 1972

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prepared by

D. W. MUNDELL, Q.C.

FOREWORD

In 1964 the Government of Ontario launched an unprecedented program for law reform. It established the Ontario Law Reform Commission to undertake a continuing study of the laws of Ontario as a whole with a view to their revision from time to time as required to meet the changing conditions of modern society. More particularly it appointed the Royal Commission "Inquiry into Civil Rights" to report on the protection afforded to citizens against encroachment on their civil rights by government action. This program is the most comprehensive undertaken in Commonwealth countries. The Government of Ontario can rightly claim to be giving leadership in this field.

As the program has gathered momentum much legislation has been passed and more is projected.

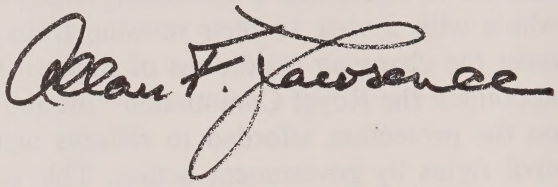
This Manual is primarily concerned with three statutes enacted by the Legislature during the past year. These statutes are among the most significant in providing new security for the civil rights of citizens against the exercise of governmental power. They control the procedure of tribunals and the powers they exercise in making decisions affecting the rights of citizens and in conducting inquiries into their affairs. They reinforce and simplify the supervision of the courts over the proceedings of these tribunals. Their provisions implement recommendations made by the Honourable J. C. McRuer in the series of reports resulting from his "Inquiry into Civil Rights".

These statutes will be brought into force by proclamation early in 1972. In order that the benefit of their reforms may be achieved as soon as possible I have arranged to have this explanatory Manual prepared. It is hoped it will be of service in this regard.

All lawyers are familiar with the long, gradual and often exasperatingly slow evolution of the law over the centuries, with little excitement apparent in the process. The statutes considered in this Manual, although in many respects bold and radical, may seem to be limited to precise and technical matters and to stir little emotion.

Nevertheless I feel that the strong current of law reform now flowing in Ontario is reason for excitement. This current can be expected to swell and accelerate to match the accelerating flow of change in society as a whole, so aptly illustrated in the book "Future Shock".

We are in a period that is unprecedented in the history of legal systems; never before has the need for continuous revision and development of law been so demanding or so urgent. I hope that my own feeling of excitement and sense of urgency in promoting the reforms discussed in this Manual may, when viewed in this perspective, be shared by those charged with carrying them into effect.



Minister of Justice and
Attorney General

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GENERAL INTRODUCTION

Three statutes enacted in 1971 by the Legislature of Ontario as part of a program for the protection of civil rights make extensive changes in the existing law of concern to many persons.

The Statutory Powers Procedure Act, 1971, c.47, establishes basic procedure for statutory tribunals designed to provide new protection for the rights of individuals.

The Public Inquiries Act, 1971, c. 49, defines in greater detail procedure for inquiries by Royal Commissions and other investigators.

The Judicial Review Procedure Act, 1971, c. 48, extensively revises the procedure to be followed on applications for judicial review of decisions made by tribunals other than the courts. The purpose of the Act is to make such applications less technical, less costly and more effective to get an early authoritative decision.

The operation of these statutes is affected by *The Judicature Amendment Act, 1970, (No. 4)*, (S.O. 1970, c. 97) and *The Judicature Amendment Act, 1971* (S.O. 1971, c. 57) establishing the Divisional Court of the High Court of Justice for Ontario. Their operation is also affected, as will be explained later, by amendments to 91 individual statutes of Ontario enacted by *The Civil Rights Statute Law Amendment Act, 1971*, (S.O. 1971, c. 50.)

All these statutes are interrelated and their provisions constitute a complex mosaic. The purpose of this booklet is to attempt to present a simplified and orderly exposition of their combined operation by explaining:

1. the practice under them as it affects members of statutory tribunals, administrators, commissions of inquiry, and persons appearing before them or affected by their operation, and
2. the new practice in proceedings for judicial review by the courts to legal practitioners.

The Federal Courts Act (S.C. 1970-71, c. 1) enacted by Parliament which came into force July 1, 1971, also amends the law in Ontario relating to judicial review of federally constituted tribunals. A brief note indicates this change.

This booklet is a manual of practice and not a legal textbook on administrative law in Ontario. However it is not possible to explain the practice without making some reference to rules of substantive law. For brevity these rules are stated categorically and many qualifications are omitted. They represent only the views of the writer. No attempt is made to cite relevant cases. Nevertheless for the assistance of lawyers in correlating parts of the digests or textbooks based on the previous law with the new legislation and particularly with *The Judicial Review Procedure Act, 1971*, reference is made where practicable to the following sources for the relevant authorities:

The Canadian Abridgement, 2nd edition, cited as "Can. Abr. Vol. , p. ."
The Canadian Encyclopaedic Digest, 2nd edition, cited as "C.E.D. Vol. , p. ,"
"Administrative Law and Practice" by R. F. Reid, Q.C., published by Butterworth (Canada) Limited in 1971, cited as "Reid p. ,"
"Judicial Review of Administrative Action", 2nd edition, by S. A. de Smith, cited as "de Smith, p. ,".

In addition, since the legislation is based largely on recommendations made in Volume I of the series of Reports of The Royal Commission "Inquiry into Civil Rights" by the Honourable J. C. McRuer, the relevant portions of that volume form background material for an understanding of the provisions of the statutes.

PART I

The Statutory Powers Procedure Act, 1971

(S.O. 1971, c. 47)

1. General purpose of Act.

Many statutes confer powers on Boards, Commissioners, Directors, Superintendents, Inspectors and other persons or bodies with a variety of titles (these are all referred to in the Act and in this manual as "tribunals") to make decisions affecting the rights of individuals. These powers cover a wide range, for example, from the power to grant, refuse, suspend or revoke licences required to engage in a particular activity to the power to expropriate land. Other statutes confer power to inquire into and to report on matters that may affect the rights of individuals although no decision is made, e.g., an inquiry officer under section 7 of *The Expropriations Act* (R.S.O. 1970, c. 154) holds an inquiry as to whether an expropriation should be approved but merely makes a report and recommendations to the approving authority. The actual decision is made by the approving authority.

Many questions arise with respect to each tribunal as to the procedure that it should follow before making its decision or its report and recommendation. Some of these questions are: Is it required to hold a hearing? If it is required to hold a hearing, who are the parties to whom it is required to give notice of the proposed hearing and who may take part in the proceedings? What rules govern the evidence that it may receive at the hearing—do the rules of evidence that apply in the courts apply to its hearing or may it receive any material as evidence it thinks relevant? Are the parties entitled to be represented by counsel? May the parties call witnesses or cross-examine witnesses called by other persons? Is the tribunal required to give reasons for its decisions or recommendations?

The courts have been required to answer these questions in relation to each tribunal as they arise and have endeavoured to require tribunals to follow fair procedures in so far as practicable without unduly hampering effective administration of the public business. They accomplish this objective by applying a presumption as to interpretation. When interpreting a statute conferring power on a tribunal, the courts frequently presume from the nature of the power or its function that although the Legislature does not expressly require the tribunal to proceed in a fair manner, the Legislature does not intend that the tribunal's proceedings should be arbitrary or capricious. In such case the courts hold that although no procedure is prescribed by the statute, the tribunal is required among other things to hold hearings, to give reasonable notice of the hearings to the persons affected, to inform such persons of any allegations against them and to afford them an opportunity to put forward their own cases. The rules of procedure so formulated are referred to as the "procedural rules of natural justice". (The term "procedural" is used to distinguish this branch of the rules of natural justice governing procedure from the other branch of the rules of natural justice governing disqualification for bias). By applying such rules, the courts have achieved much towards establishing a fair and just procedure for many tribunals. However the powers of the courts are not such as to enable them to apply an appropriate fair procedure to all types of statutory powers. Many statutory powers may therefore be exercised without following a fair procedure although some such procedure adapted to their special nature would be practicable.

The law as it has developed is unsatisfactory to both those exercising powers of decision and those affected by their decisions because of two major uncertainties:

(1) When do the procedural rules of natural justice apply to proceedings of a particular tribunal? and

(2) When they apply, what procedure do they require the particular tribunal to follow?

To determine whether the rules applied, the courts have attempted to classify tribunals as being "judicial" or "quasi judicial", in which case the procedural rules of natural justice apply, or as "purely administrative", in which case they do not apply. No clear distinctions between these concepts can be successfully drawn with the result that the determination of the tribunals to which the rules of natural justice apply and those to which they do not apply often remains a difficult question. (See McRuer Rep., Vol. 1, pp. 28-31; 138 et seq.)

Even where the procedural rules of natural justice apply, uncertainties exist as to what they require a particular tribunal to do, e.g., parties have been held to be entitled to cross-examine the witnesses before some tribunals but have been held not to be entitled to do so before other tribunals.

These uncertainties make it difficult for a tribunal to know what procedure it is required to follow and for a person affected by proceedings to know what his procedural rights are.

As a result, actions are frequently brought in the courts to determine whether the procedural rules of natural justice apply, or what they require. Unnecessary delay is caused in carrying out important governmental action together with delays and expense for the persons affected.

The purpose of *The Statutory Powers Procedure Act, 1971,* is to meet many of the difficulties that arise under the present law. The Act is divided into two Parts.

Part I deals with "Minimum Rules for Proceedings of Certain Tribunals". Tribunals exercising statutory powers that are required to follow a fair procedure are designated: a code of minimum rules of fair procedure for them to follow is enacted and defines and controls their powers. The objectives of this Part are fourfold,

(1) to overcome uncertainties as to when the procedural rules of natural justice apply and what they require;

(2) to furnish guidance to tribunals as to the conduct of their proceedings;

(3) to inform persons affected of their rights; and

(4) to minimize delay and expense in determining procedural matters.

Part II is entitled "The Statutory Powers Procedure Rules Committee". This Part provides for the establishment of a committee with two functions,

(1) to maintain under continuous review the practice and procedure for the exercise of a broad range of statutory powers; and

(2) to act as a consultative body in the making of appropriate rules additional to the minimum rules for tribunals to which Part I applies, and in the making of rules for the exercise of statutory powers of certain classes of tribunals to which Part I does not apply.

The objectives of this Part are,

(1) to provide assistance to tribunals concerning procedure to be followed in the exercise of statutory powers;

(2) to ensure that standards of fair procedures are met;

(3) to ensure that additional rules supplementing the minimum rules for tribunals to which they apply meet proper standards; and

(4) to ensure that appropriate rules are made for tribunals to which application of the minimum rules is not appropriate and that require rules specially adapted to their particular needs.

2. Application of Minimum Rules enacted in Part I of the Act.

(1) PROCEEDINGS TO WHICH PART I EXPRESSLY MAKES MINIMUM RULES APPLY.

The application of Part I is dealt with in section 3 of the Act and in certain of the definitions in section 1. The basic provision is section 3(1) which provides:

> "3.—(1) Subject to subsection 2, this Part applies to proceedings by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act or otherwise by law to hold or to afford to the parties to the proceedings an opportunity for a hearing before making a decision."

Subsection 2 lists certain exceptions that will be discussed later.

Subsection 1 may be broken down into elements requiring detailed consideration.

"this part applies"

"This part" refers to Part I of *The Statutory Powers Procedure Act, 1971*, which prescribes the "Minimum Rules" of procedure. For brevity, these rules are referred to hereafter as the "Minimum Rules".

"to proceedings by a tribunal"

Section 1(*e*) of the Act defines "tribunal" for the purposes of the Act as follows:

> "(*e*) 'tribunal' means one or more persons, whether or not incorporated and however described, upon which a statutory power of decision is conferred by or under a statute."

The definition includes a single person such as a Director or Superintendent whatever may be his name of office, and two or more persons such as a Board or Commission however described. The significant feature is that a "statutory power of decision" is conferred on such person or persons.

"in the exercise of a statutory power of decision"

A "statutory power of decision" is defined for the purposes of the Act in section 1(*d*) as follows:

> "(*d*) 'statutory power of decision' means a power or right, conferred by or under a statute, to make a decision deciding or prescribing,
>
> (i) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
>
> (ii) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether he is legally entitled thereto or not."

The definition is limited to power "to make a decision deciding or prescribing" the matters mentioned. The Minimum Rules do not therefore apply to proceedings in the exercise of a power merely to make investigations or advisory reports and recommendations. The rules governing their proceedings will be discussed later. (See Part II of this manual).

The expressions "deciding" and "prescribing" extend the powers of decision coming within the definition to both powers to make decisions according to law and powers to make decisions creating or defining rights authoritatively on grounds of policy. Distinctions between "judicial", "quasi judicial" and "purely administrative" powers are of no significance under this definition. Under subclause (ii) a power of decision extends to deciding or prescribing the eligibility of any person to receive or to the continuation of a benefit or "licence". The expression "licence" is defined for the purposes of the Act to include "any permit, certificate, approval, registration or similar form of permission required by law" (sec. 1(*b*)).

"conferred by or under an Act of the Legislature"

The Minimum Rules are limited in their application to proceedings of tribunals established by or under a provincial statute. They do not apply to powers of decision conferred by an Act of the Federal Parliament.

The expression "by or under" used in this section (and also in the definition of a "statutory power of decision") covers not only a power of decision conferred directly by a statute but also a power of decision created by regulation or by-law made under authority of a statute. The Minimum Rules therefore apply to proceedings by tribunals established by municipal by-laws passed under *The Municipal Act* or any special Act if they otherwise come within the terms of the Act, (e.g., self-governing bodies).

"where the tribunal is required by or under such Act or otherwise by law to hold or afford to the parties in the proceedings an opportunity for a hearing before making a decision".

The general rule is that the Minimum Rules apply to the proceedings of all tribunals that are *required* to hold hearings. The significant expressions in this provision are the expression "required by or under such Act" and the expression "or otherwise by law".

The effect of the expression "required by or under such Act" is to make the Minimum Rules apply to proceedings by all tribunals that are expressly required by or under the Acts establishing them to hold hearings. Many existing statutes of Ontario expressly do so. It is intended that future statutes will expressly specify that a hearing is required where appropriate. The object is to replace the present uncertainties as to the tribunals to which the procedural rules of natural justice apply and their requirements with an expressly defined class of tribunals and a defined fair procedure.

The effect of the expression "or otherwise by law" is to make the Minimum Rules apply to proceedings by tribunals established under a large number of existing statutes of Ontario that do not expressly require hearings but under which hearings are now required by the procedural rules of natural justice. This provision does not clarify the uncertainty as to whether a hearing is required by the

rules of natural justice but does define the procedure to be followed once this is established and removes uncertainty in this respect.

The application of the rules where a hearing is required "otherwise by law" is a transitional provision pending review and amendment of the existing statutes to provide expressly for hearings in appropriate instances. All statutes of Ontario establishing tribunals are now being reviewed for this purpose. When the amendments have been completed, the expression "otherwise by law" will cease to have significance except as a residual protection.

Many statutes have already been reviewed and as a result *The Civil Rights Statute Law Amendment Act, 1971*, (S.O. 1971, c. 50) enacted amendments to 91 individual statutes to prescribe, among other things, whether tribunals created under these statutes are required to hold hearings. A simple illustration of the type of amendment enacted is furnished by amendments made in section 69 of that Act to *The Provincial Auctioneers Act* (R.S.O. 1970, c. 368) which provides for licensing by the Live Stock Commissioner. With respect to revocation of licences, that Act was amended to provide:

> "1*b*.—(1) The Commissioner may revoke a licence if, *after a hearing*, he is of opinion that the licensee or any person under his control or direction or associated with him in connection with his operations as a licensee has not carried on his business as an auctioneer in accordance with law and with honesty and integrity.
>
> (2) The Commissioner, by notice to a licensee and *without a hearing*, may suspend the licensee's licence where in the Commissioner's opinion it is necessary to do so for the immediate protection of the interests of persons dealing with the licensee and the Commissioner so states in such notice giving his reasons therefor, and thereafter the Commissioner *shall hold a hearing* to determine whether the licence should be revoked under this Act." (emphasis added)

The Minimum Rules apply to the proceedings for which a hearing is required under this section.

The Minimum Rules, as their name implies, are limited to minimum procedural requirements that may be imposed generally on all tribunals to which they apply. In the course of reviewing the statutes it became apparent that additional rules for certain tribunals should be enacted and that the Minimum Rules should be varied in their application to certain tribunals to meet special circumstances. Amendments to these statutes therefore, in addition to specifying that a hearing is required, in many instances also enact provisions imposing on some tribunals additional procedural requirements or overriding for some tribunals certain of the Minimum Rules.

Reference is made in this manual to certain of these special amendments where it is of assistance in explaining the operations of tribunals. The references are for illustrative purposes only and they are not exhaustive.

To ascertain all requirements for any particular tribunal the statute establishing it, as amended, must be read with *The Statutory Powers Procedure Act, 1971.*

(2) Proceedings expressly excepted from application of Minimum Rules by Part I.

Section 3(2) of the Act lists proceedings before specified tribunals to which the Minimum Rules do not apply. Some of the exceptions are listed because the

rules would otherwise apply and it is considered unnecessary or inappropriate that they should do so; some of the exceptions appear to be listed simply to remove doubt.

The Minimum Rules do not apply to proceedings specifically enumerated as follows in section 3(2):

. . .

"(a) *before the Assembly or any committee of the Assembly;*

(b) *in or before,*

(i) *the Supreme Court,*

(ii) *a county or district court,*

(iii) *a surrogate court,*

(iv) *a provincial court established under The Provincial Courts Act,*

(v) *a small claims court,*

(vi) *a justice of the peace,*

(vii) *an election court under The Controverted Elections Act;**

(c) *to which the Rules of Practice and Procedure of the Supreme Court apply;"*

It is not necessary to apply the Minimum Rules to these proceedings since a fair procedure has been already established. In particular, where the Rules of Practice and Procedure of the Supreme Court apply to any proceedings, rules of procedure are provided which are more detailed and specific than the Minimum Rules.

"(d) *before an arbitrator to which The Arbitrations Act or The Labour Relations Act applies;"*

Procedure on these arbitrations is already provided by the named statutes.

"(e) *at a coroner's inquest;"*

Rules for coroner's inquest are partially provided for by *The Coroners Act.* The Statutory Powers Procedure Rules Committee is required to review the procedure on coroner's inquest and may require rules to be made.

"(f) *of a commission appointed under The Public Inquiries Act, 1971;"*

The procedure before Royal Commissions is governed by *The Public Inquiries Act, 1971,* itself (see Part II of this manual). Additional rules may also be recommended by The Statutory Powers Procedure Rules Committee.

"(g) *of one or more persons required to make an investigation and to make a report, with or without recommendations, where the report is for the information or advice of the person to whom it is made and does not in any way legally bind or limit that person in any decision he may have power to make;"*

Since persons required to make an investigation and report do not have a power of decision they do not fall within the definition of a tribunal within section 3(1) and the Minimum Rules do not apply. This clause appears to have been inserted to make this quite clear. The Statutory Powers Procedure Rules Committee may require rules to be made to govern proceedings on these inquiries.

"(h) *of a tribunal empowered to make regulations, rules or by-laws in so far as its power to make regulations, rules or by-laws is concerned."*

*The Controverted Elections Act was repealed by 1971, c. 100, s. 11. Provisions dealing with corrupt practices and controverted elections are now included as Part VIII of The Election Act. See 1971, c. 100, s. 9.

The making of regulations requires that a decision affecting rights be made and therefore the Minimum Rules might appear to apply to regulation making proceedings. Clause *h* makes it clear that they do not apply.

(3) EFFECT OF MINIMUM RULES ON RULES UNDER OTHER STATUTES.

Section 32 of the Act provides:

"32. Unless it is expressly provided in any other Act that its provisions and regulations, rules or by-laws made under it apply notwithstanding anything in this Act, the provisions of this Act and of rules made under section 33 prevail over the provisions of such other Act and over regulations, rules or by-laws made under such other Act which conflict therewith."

The effect of this provision is that as a general rule the Minimum Rules override conflicting procedural rules for a tribunal enacted in or made under any other statute, (even the statute establishing the tribunal) unless it is "expressly provided" in such other Act that the rules made by or under it apply "notwithstanding anything in this Act", i.e. *The Statutory Powers Procedure Act, 1971*. In the absence of such a provision if there is any conflict between the rules made by or under such other Act and the Minimum Rules, effect should be given to the Minimum Rules to the extent of the conflict. Where there is no conflict the procedural rules in or under any such other Act continue to operate together with the Minimum Rules to supplement or add to them.

Where another statute expressly excludes or modifies the Minimum Rules in whole or in part "notwithstanding anything in *The Statutory Powers Procedure Act, 1971*", the provisions of such other Act govern to the extent that the Minimum Rules are so excluded or modified.

(4) MODIFICATION IN APPLICATION OF MINIMUM RULES BY AGREEMENT, CONSENT OR WAIVER BY PARTIES.

Section 4 of the Act provides:

"4. Notwithstanding anything in this Act and unless otherwise provided in the Act under which the proceedings arise, or the tribunal otherwise directs, any proceedings may be disposed of by,

(*a*) agreement;

(*b*) consent order; or

(*c*) a decision of the tribunal given,

(i) without a hearing, or

(ii) without compliance with any other requirement of this Act,

where the parties have waived such hearing or compliance."

A statute that requires that a tribunal may only make a decision "after a hearing" might be interpreted to mean that the tribunal must hold a hearing even though the parties contesting the matter before the tribunal have reached agreement and there is no longer any matter in dispute. Further, the statute might be interpreted to require the Minimum Rules to be complied with in full in all cases even though the parties are prepared to waive procedural requirements. Avoidable delay and expense would be caused by unnecessary proceedings.

The effect of clauses *a* and *b* of section 4 is to make it clear that even though a statute requires a hearing by a tribunal, the parties may agree to the disposition of any matter before the tribunal by agreement or by consent order without a hearing

unless disposition in this way is prohibited under the Act under which the proceedings arise, or the tribunal otherwise directs.

Where all parties to a proceeding are identified and their interests are the sole interests concerned, the tribunal should in the ordinary course be prepared to give effect to any agreement or consent order they propose. An illustration is afforded where a hearing is to be held to determine whether a licence should be revoked. If the licensee who had been contesting the revocation consents to an order directing its revocation, the tribunal should not require the hearing to proceed.

Where some public interest or other interest beyond those of the parties is concerned in the proceedings, the tribunal should not accept the agreement or give effect to the consent order without a hearing unless it is satisfied that this public or other interest is protected. An illustration is afforded where two parties apply for licences to operate public commercial vehicles over a particular route and the parties reach agreement between themselves that the licence should be granted to one of them. The Ontario Highway Transport Board is required to certify public necessity and convenience to the Minister before a licence is granted. If the protection of the public interest requires that a hearing be held to determine public necessity and convenience, the Board should not give effect to the agreement between the parties without a hearing.

Under clause *c* of section 4, the holding of a hearing or compliance with any of the requirements of the Minimum Rules may be waived by the parties subject to the same restrictions. With the consent of the parties if no other interest is involved, the tribunal may proceed as informally as it considers advisable with a view to expediting the decision or reducing expense and delays.

A tribunal should take care that any agreement or consent by the parties or waiver of their rights is recorded in the proceedings.

(5) Postponement of application of Minimum Rules.

Many existing statutes of Ontario require that hearings be held by tribunals before they make a decision. The Minimum Rules therefore apply to their proceedings. The application of the Minimum Rules may require special consideration in relation to any particular tribunal. Time may be needed to make amendments to the statute establishing the tribunal to modify their application to its proceedings. Section 36(1) of the Act therefore provides:

> "36.—(1) The Lieutenant Governor in Council may by order exempt the proceedings of any tribunal from the application of Part I or of any provision thereof for any period stated in the order, but no such period shall extend beyond one year after this Act comes into force."

A party concerned with the proceedings before a tribunal should satisfy himself that no postponement order has been made.

3. Procedural requirements of Minimum Rules.

(1) Parties to proceedings in which hearing is held.

It is essential in the interests of justice that all persons who may be affected or aggrieved by the decision of a tribunal, have an opportunity to take part in the hearing in order to ensure that they may present their cases in protection of their interests. Exclusion of a proper party may invalidate the proceedings. Establishment of the identity of the parties to the proceedings is also important where an

appeal from the decision has been provided or where an application for judicial review of the proceedings may be brought. A tribunal should adopt the practice of establishing on the record who are the parties in every proceeding before commencing a hearing.

Section 5 designates the persons who have status as parties. It provides:

> "5. The parties to any proceedings shall be the persons specified as parties by or under the statute under which the proceedings arise or, if not so specified, persons entitled by law to be parties to the proceedings."

The following expressions in this provision are significant:

"persons"

"Persons" includes all individual natural persons. The expression also includes corporations. (*The Interpretation Act*, R.S.O. 1970, c. 225, s. 30, par. 28). The scope of the word "person" is extended for the purposes of this Act to include certain organizations that may not be "persons" for other purposes. Section 1(2) provides:

> "1.—(2) A municipality, an unincorporated association of employers, a trade union or council of trade unions who may be a party to proceedings in the exercise of a statutory power of decision under the statute conferring the power, shall be deemed to be a person for the purpose of any provision of this Act or of any rule made under this Act that applies to parties."

"specified as parties by or under the statute"

It is proposed that future statutes and existing statutes that are revised to require a hearing will specify who are the parties to each hearing as far as this is practicable. A typical provision in a licensing statute providing for a hearing before a Licence Review Board is as follows:

> "The Director, the applicant or licensee and such other persons as the Board may specify are parties to the proceedings before the Board under this Act."

If the Board considers that a person other than the Director or the applicant or licensee has a direct and immediate interest that will be affected by the decision of the Board it may, and should, specify such other person as a party to the proceedings.

"persons entitled by law to be parties"

Where a statute does not specify the parties, they are to be determined under the law as it existed before enactment of the Act. The general principle is that any person who will be directly affected by the decision of the tribunal is entitled to be a party and should be recognized as such by the tribunal.

In many cases no difficulty arises in determining who are the proper parties to the proceedings.

Where a hearing is to be held and any uncertainty as to parties arises, if there is a Registrar, Secretary or other similar administrative officer of the tribunal, he should satisfy himself that proper persons are made parties. To do this he may consult with the known parties to find out if other persons should be included. If there is no Registrar or other similar officer, a member of the tribunal who will not be required to take part in the hearing might make such preliminary inquiries. Such a procedure does not conflict with the requirements discussed later that members of the tribunal who take part in a decision shall not

take part in the consideration of the subject matter of the hearing before it comes before them. If all members of the tribunal are required to take part in the hearing and there is no Registrar or other similar officer, the tribunal should hold a preliminary hearing at which the known parties are represented to determine who are the parties.

Where a person who is entitled to be a party is not served but applies to be added as a party at the commencement of the hearing or later, if it appears to the tribunal that he has not had sufficient actual notice of the hearing to make adequate preparation to present his case, the tribunal should adjourn the hearing to permit him to make proper preparation.

(2) PROCEDURE BEFORE HEARING.

(a) Notice of hearing

Section 6(1) of the Act provides:

"6.—(1) The parties to any proceedings shall be given reasonable notice of the hearing by the tribunal."

This section imposes a mandatory requirement that notice be given to the "parties". Failure to comply with the provision may invalidate the proceedings. As already indicated it is therefore essential that the parties be identified at the outset of the proceedings (see also paragraph *c* below "Service of notice of hearing").

What constitutes "reasonable notice" depends upon the circumstances. The notice should be given a sufficient time before the hearing to permit the parties to investigate the case against them and prepare their presentation to the tribunal.

The length of notice may be affected by a provision that is contained in many licensing statutes to the following effect:

"Notice of a hearing shall afford the applicant or licensee a reasonable opportunity to show or to achieve compliance before the hearing with all lawful requirements for the issue or retention of the licence."

This provision applies particularly to notice of a hearing for proposed revocation of a licence where the grounds for revocation are reasonably capable of rectification before the hearing. An example is where the grounds for revocation are that the premises in which a licensee carries on his business do not comply with requirements imposed by the Act under which the licence is issued. The time to be allowed requires a balancing of the undesirability of the licensee continuing to carry on a business in unsuitable premises against the undesirability of revoking a licence for some minor non-compliance which may be rectified immediately.

The tribunal should satisfy itself at the commencement of the hearing that such an opportunity was afforded by the length of the notice given. If it is satisfied that it was practicable to allow for rectification and sufficient time was not given, it should grant an adjournment.

(b) Contents and form of notice of hearing

Section 6(2) of the Act provides:

"(2) A notice of a hearing shall include,

(*a*) a statement of the time, place and purpose of the hearing;

(*b*) a reference to the statutory authority under which the hearing will be held; and

(*c*) a statement that if the party notified does not attend at the hearing, the tribunal may proceed in his absence and he will not be entitled to any further notice in the proceedings."

A suggested form of notice that appears to comply with these requirements is as follows:

(Name of the Act under which proceedings arise)
(Name of tribunal)

In the Matter of:

(Describe proceedings sufficiently to identify them)

TO:

NOTICE OF HEARING

Take notice that a hearing before the

(name of tribunal)

will be held at in the of

commencing on the day of A.D. 19

at o'clock in the noon to (describe purpose of hearing).

And further take notice that if you do not attend at this hearing the (name of tribunal) may proceed in your absence and you will not be entitled to any further notice in the proceedings.

Dated the day of 19 .

.....

(Tribunal)

(c) Service of notice of hearing

Section 6(1) quoted above provides the notice "shall be given . . . by the tribunal".

It is a sufficient compliance with this provision if the tribunal causes the notice to be given. Thus it may require any person, including one of the parties, to serve the notice.

The statute does not prescribe any particular mode of giving the notice. Any mode whether by ordinary mail, registered mail or personal service, that actually brings the notice to the attention of the person to be served would appear to be acceptable. Probably a notice given orally would be sufficient if it otherwise complies with the requirements of the Act.

Several statutes provide:

"(1) Any notice or order required to be given or served under this Act or the regulations is sufficiently given or served if delivered personally or sent by registered mail addressed to the person to whom delivery or service is required to be made at the latest address for service appearing on the records of the Department.

(2) Where service is made by registered mail the service shall be deemed to be made on the third day after the day of mailing unless the person on

whom the service is being made establishes that he did not, acting in good faith, through absence, accident, illness or other cause beyond his control receive the notice or order until a later date."

Such a section should not be relied on to prove service of a notice of hearing required under *The Statutory Powers Procedure Act, 1971,* since the notice is required under the latter Act rather than under the Act containing a provision such as the one quoted.

Where a party is not an individual but is a corporation or a partnership, service on the persons specified in rules 23 and 103 of the Rules of Practice of the Supreme Court should be sufficient service on the corporation or partnership.

The Act contains the following provision relating to service:

"24.—(1) Where a tribunal is of opinion that because the parties to any proceedings before it are so numerous or for any other reason it is impracticable,

(*a*) to give notice of the hearing; or

. . .

to all or any of the parties individually, the tribunal may, instead of doing so, cause reasonable notice of the hearing . . . to be given to such parties by public advertisement or otherwise as the tribunal may direct."

This provision confers wide powers "Where a tribunal is of opinion" that because the parties are so numerous or for any reason it is impracticable to give notice of the hearings individually. In such case the tribunal may instead of doing so cause "reasonable notice" to be given to such parties by public advertisement "or otherwise as the tribunal may direct". It is designed to assist in the conduct of proceedings where the proceedings are such that members of the public may wish to appear or where large numbers of persons e.g. nearby property owners, have an interest. The powers conferred on the tribunal must be exercised by the tribunal itself and not a subordinate official and the tribunal should record its opinion and its directions in the record of the proceedings.

The provision also authorizes a tribunal to permit some form of service in substitution for personal service (whether by mail or personal delivery) in proper cases. A tribunal should adopt a procedure analogous to the procedure of the courts in directing substitutional service and should record its direction in the record of the proceedings.

(d) Impartiality of members of tribunal

The Minimum Rules contain no provision concerning impartiality. The common law would apply in the absence of a provision in the statute establishing the tribunal. A member of a tribunal who is disqualified by bias from taking part in any proceeding before the tribunal should withdraw from the proceedings.

Some statutes contain provisions to the following effect which substantially state the common law as to the conduct of members of a tribunal:

"Members of the Board assigned to render a decision after a hearing shall not have taken part prior to the hearing in any investigation or consideration of the subject matter of the hearing and shall not communicate directly or indirectly in relation to the subject matter of the hearing with any person or with any party or his representative except upon notice to and opportunity for all parties to participate, but such members may seek legal advice from an adviser independent from the parties and in such case the nature of the advice should be made known to parties in order that they may make submission to the law."

The principle underlying this provision is that the tribunal should be impartial—no man should be both prosecutor and judge in the same cause, nor should he receive information or argument from any person (whether a party or not) in the absence of a party which that party has no opportunity to answer.

The provision is designed to ensure not only that the tribunal is impartial, which is essential to the making of a fair decision, but also that its impartiality is apparent, which is essential to establish confidence in its proceedings.

Members of any tribunal should, wherever practicable, adhere to the course of conduct prescribed by this provision, even though the statute creating the tribunal does not expressly require it. They should do so not only before the hearing but also throughout the proceedings until the decision has been given.

A statute creating a tribunal may exclude compliance with this principle. An example is furnished where a Director, who is the administrative officer charged with investigation and enforcement of breaches of the provisions of a statute, is also authorized to revoke licences for such breaches after a hearing. He must therefore investigate complaints and give consideration to the revocation of the licence in advance of the hearing to determine whether the hearing should be held. A statute that provides for this type of administration usually confers a right of appeal from the Director's decision for a hearing *de novo* by a court or by a tribunal whose impartiality is safeguarded by a provision similar to the foregoing.

(e) Information to be furnished to parties before hearing.

Section 8 of the Act provides:

> "8. Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto."

The expression "reasonable information of any allegations" requires that a party be given sufficient information about the allegations to permit him to prepare his answer to them. The information should be furnished sufficiently "prior to the hearing" to afford him an adequate opportunity to do so.

Many licensing statutes also contain additional provisions to the following effect:

> "An applicant or licensee who is a party to proceedings in which the Director holds a hearing shall be afforded an opportunity to examine before the hearing any written or documentary evidence that will be produced or any report the contents of which will be given in evidence at the hearing."

The carrying out of the requirements of these provisions is not a matter for the tribunal holding the hearing. The duty of compliance falls upon the administrator or person making the allegations or proposing to put the documentary evidence or report before the hearing. The function of the tribunal is to satisfy itself at the hearing that the provisions have been complied with so that the party or applicant or licensee is not surprised by allegations or evidence. Where the tribunal feels that these provisions have not been complied with to the prejudice of the party or the applicant or licensee, the tribunal should grant an adjournment.

(3) PROCEDURE AT HEARING.

(a) Oral hearing

Although not expressly provided, the hearing contemplated by the Act is obviously an oral hearing at which witnesses may be called and cross-examined. A

party is entitled to insist upon such a hearing subject to the discretion of the tribunal as to the extent to which it may admit evidence inadmissible in court and unsworn evidence. Where reasonable, to avoid delay and expense, the tribunal may dispense with unnecessary formalities.

It is open to the parties to agree however to a hearing other than an oral hearing (see ante p. 7).

(b) Order of proceeding at hearing

The Act contains no provision prescribing the order of proceeding at the hearing. It is therefore within the power of the tribunal to determine the order in the case of each hearing. The tribunal may properly adopt a standard practice but should be prepared in any particular case to consider a departure from such standard practice.

Although the Act contemplates informal hearings with a view to saving time and expense, the tribunal should not permit informality to develop into disorderliness. It should endeavour to follow an orderly mode of proceedings that will permit each party to develop his case in an organized manner.

(c) Non-appearance of party

Section 7 of the Act provides:

"7. Where notice of a hearing has been given to a party to any proceedings in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in his absence and he is not entitled to any further notice in the proceedings."

Before proceeding with a hearing in the absence of a party, the tribunal should be satisfied that notice of the hearing containing a warning to this effect had been duly given to him and record such fact in the record.

(d) Hearing in public

Section 9(1) of the Act provides:

"9.—(1) A hearing shall be open to the public except where the tribunal is of the opinion that,

(*a*) matters involving public security may be disclosed; or

(*b*) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,

in which case the tribunal may hold the hearing concerning any such matters *in camera*."

The principle upon which courts are required to hold trials in public is that it is in the interest of the public that proceedings in the courts should be open to scrutiny to ensure that justice is done and may be seen to be done. The requirement is intended as a protection of this public interest and not of the interests of the parties to the proceedings. The principle is departed from by the courts only where the adverse effects upon the parties or the public are considered to be so serious that they outweigh it. The same principle is made applicable to tribunals, but it is recognized that in investigations carried on by tribunals there should be a wider discretion than that exercised by the courts.

Some statutes establishing tribunals expressly enact a provision authorizing hearings to be held *in camera* "notwithstanding anything in *The Statutory Powers Procedure Act, 1971*," which overrides section 9(1).

(e) Counsel for parties at hearing

The Act provides in section 10 that a party to proceedings may be represented at a hearing by counsel or an agent. The agent need not be a legally qualified practitioner.

The tribunal is empowered to exclude an agent in certain circumstances. Section 23(3) provides:

> "(3) A tribunal may exclude from a hearing anyone, other than a barrister and solicitor qualified to practise in Ontario, appearing as an agent on behalf of a party or as an adviser to a witness if it finds that such person is not competent properly to represent or to advise the party or witness or does not understand and comply at the hearing with the duties and responsibilities of an advocate or adviser."

(f) Rights of parties at hearing

Section 10 of the Act provides:

> "10. A party to proceedings may at a hearing,
>
> . . .
>
> (*b*) call and examine witnesses and present his arguments and submissions;
> (*c*) conduct cross-examinations of witnesses at a hearing reasonably required for a full and fair disclosure of the facts in relation to which they have given evidence."

A party is entitled to be present at the hearing and as already indicated to be represented by counsel or agent, to call and examine his witnesses, to put in his documentary evidence and to cross-examine witnesses called by other parties.

Cross-examination is limited by the requirement that it should be reasonably required for a full and fair disclosure of the facts in relation to which the witness has given evidence. A tribunal should not permit fishing expeditions concerning matters not relevant to the subject matter of the hearing.

The right to cross-examine is limited to the right to ask questions of a witness. The purpose is to elicit further information relevant to the issues in the proceedings or to test reliability of the evidence a witness has given, including the credibility of the witness himself. A person conducting a cross-examination may not give evidence by making statements of fact or present argument. If the person conducting the cross-examination wishes to make statements of fact he should present himself as a witness to give evidence as to the facts so that he may be cross-examined on his evidence. Arguments should be presented after all the evidence has been taken.

It is a practice in the courts where there are large numbers of parties in the same interest to indicate at the outset that only one cross-examination of witnesses on their behalf will be permitted. The parties should agree amongst themselves who should conduct such cross-examination. If it develops that there is a difference in interests amongst the parties, additional cross-examination on behalf of the new interests that have emerged is permitted. The power of the tribunal to control its own proceeding applies to restrict needless and repetitive cross-examination while at the same time affording an opportunity for proper cross-examination.

The tribunal is expressly empowered to limit cross-examination by section 23(2) which provides:

> "(2) A tribunal may reasonably limit further cross-examination of a witness where it is satisfied that the cross-examination of the witness has been sufficient to disclose fully and fairly the facts in relation to which he has given evidence."

This provision is of particular significance in relation to hearings to which there are many parties. A tribunal should exercise its powers under this provision to prevent witnesses from being harassed or hearings being unnecessarily prolonged by unduly repetitious cross-examination.

(g) Power of tribunal to summon witnesses

Section 12(1) of the Act provides:

> "12.—(1) A tribunal may require any person, including a party, by summons,
> (*a*) to give evidence on oath or affirmation at a hearing; and
> (*b*) to produce in evidence at a hearing documents and things specified by the tribunal,
>
> relevant to the subject-matter of the proceedings and admissible at a hearing."

The form of summons prescribed by the Act is as follows:

> "(Name of Act under which proceedings arise)
>
> SUMMONS TO A WITNESS BEFORE .....
> .....(name of tribunal)
> ..... at a hearing to be held at .....
> ..... in the ..... of .....
> ..... on ..... the ..... day
> of ..... 19..... at the hour of ..... o'clock in
> the ..... noon (local time), and so from day to day until the hearing is concluded or the tribunal otherwise orders, to give evidence on oath touching the matters in question in the proceedings and to bring with you and produce at such time and place .....
> .....
> .....
>
> Dated the ..... day of ..... 19 .....
>
> .....
> (Name of tribunal)
>
> .....
> (Member of tribunal)
>
> Note:
> You are entitled to be paid the same personal allowances for your attendance at the hearing as are paid for the attendance of a witness summoned to attend before the Supreme Court.

If you fail to attend and give evidence at the hearing, or to produce the documents or things specified, at the time and place specified without lawful excuse, you are liable to punishment by the Supreme Court in the same manner as if for contempt of that court for disobedience to a subpoena."

Section 12 also provides that where a witness fails to comply with the summons the tribunal or a party may apply to a judge for a bench warrant authorizing the arrest of the witness for the purpose of bringing him before the tribunal.

Section 13 makes provision for proceedings for the punishment by the Divisional Court of a witness who is duly summoned by a tribunal and "without lawful excuse" fails to comply with the summons or being in attendance, refuses to give evidence or produce documents, upon application of either the tribunal or a party to the proceedings.

(h) Protection of witnesses at hearing

Sections 11 and 14 of the Act provide as follows:

"11.–(1) A witness at a hearing is entitled to be advised by his counsel or agent as to his rights but such counsel or agent may take no other part in the hearing without leave of the tribunal.

(2) Where a hearing is *in camera*, a counsel or agent for a witness is not entitled to be present except when that witnesss is giving evidence."

. . .

"14.—(1) A witness at a hearing shall be deemed to have objected to answer any question asked him upon the ground that his answer may tend to criminate him or may tend to establish his liability to civil proceedings at the instance of the Crown, or of any person, and no answer given by a witness at a hearing shall be used or be receivable in evidence against him in any trial or other proceedings against him thereafter taking place, other than a prosecution for perjury in giving such evidence.

(2) A witness shall be informed by the tribunal of his right to object to answer any question under section 5 of the *Canada Evidence Act*."

The witness is entitled to have counsel to advise him at a hearing, e.g., as to whether any evidence is privileged or whether he should claim protection for answers to questions that may incriminate him. Under section 14(1), the witness is afforded automatic protection from the use of his answers in civil proceedings or in proceedings concerning offences under provincial legislation but as the authorities now stand he has no protection from use of his answers given in subsequent criminal proceedings unless he claims protection under section 5 of the *Canada Evidence Act*. He is entitled to seek advice of his counsel on such matters. Counsel for a witness who is not a party to the proceedings is not permitted to take any other part in the proceedings, e.g., he cannot call witnesses or cross-examine witnesses called by the parties without the permission of the tribunal. He is not entitled to be present during hearings *in camera* except when his client is giving evidence.

(i) Evidence at hearing

Three aspects of the evidence taken at a hearing require consideration:

(i) Material that is admissible in evidence;

(ii) The manner of proof of the authenticity of such material—oaths and affirmations; and

(iii) Introduction of evidence: discretion of tribunal.

Section 15(1) of the Act deals with the first two points:

"15.—(1) Subject to subsections 2 and 3, a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

(*a*) any oral testimony; and

(*b*) any document or other thing,

relevant to the subject matter of the proceedings and may act on such evidence, but the tribunal may exclude anything unduly repetitious."

(i) *Material admissible in evidence*

The effect of this provision rendering any oral testimony, document or other thing admissible in evidence, whether or not admissible as evidence in a court, (subject to exceptions discussed below) is to permit a tribunal to admit hearsay evidence or opinions or conclusions of a witness. It may also admit written documents or reports as to facts from any source whether or not produced by the person preparing the document or report. The weight to be attached to the material in establishing facts is a matter to be decided by the tribunal.

The section does not require the tribunal to admit all such material but merely empowers it to do so. The tribunal has therefore a power to admit such material or to insist upon material complying with the rules of evidence applicable in the courts.

Section 15(2) excludes certain material as evidence. It provides:

"(2) Nothing is admissible in evidence at a hearing,

(*a*) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(*b*) that is inadmissible by the statute under which the proceedings arise or any other statute."

Under clause *a*, evidence that would not be admissible in a court because of any privilege under the law of evidence is not admissible by a tribunal. Thus a solicitor called as a witness cannot be compelled to give evidence of information furnished to him by his client which he would not be compelled to give in court. Similarly a spouse cannot be compelled to reveal matters communicated to him or her by his or her spouse which he or she could not be compelled to give in evidence in court.

Clause *b* excepts from admissibility information obtained under a statute requiring persons to make reports or to give evidence for the purpose of the administration of that statute where the statute prohibits the communication of such information for purposes other than its administration or enforcement. A tribunal should not compel information gained by a person under the authority of such a statute to be disclosed except as provided by a statute.

Section 15(3) provides as follows:

"(3) Nothing in subsection 1 overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceedings."

This provision applies particularly to a provision such as section 100 of *The Labour Relations Act* (R.S.O. 1970, c. 232). That section provides that certain information in the records of a trade union furnished in evidence before the

Ontario Labour Relations Board is for the exclusive use of the Board and shall not be disclosed except with the consent of the Board. A tribunal cannot compel a witness having such information to give evidence of the information unless the consent of the Ontario Labour Relations Board has been given.

(ii) *Proof of authenticity of evidence: oaths and affirmations:*

Section 15(1) authorizes a tribunal to admit oral testimony and any document or other thing whether or not it is proven under oath or affirmation.

Section 22 of the Act however provides:

> "22. A member of a tribunal has power to administer oaths and affirmations for the purpose of any of its proceedings and the tribunal may require evidence before it to be given under oath or affirmation."

The tribunal therefore has power to admit evidence not proven under oath or affirmation or to require it to be so proven.

(iii) *Introduction of evidence: discretion of tribunal.*

A tribunal has power to accept evidence inadmissible in court and evidence not proven by sworn testimony or to insist upon proof of any fact in accordance with the strict rules of evidence or by sworn testimony. The obvious purpose of the statute in conferring this power on the tribunal is to permit it to proceed informally, in so far as such informality is consistent with a just hearing to all parties, to save parties and other persons affected, such as witnesses, time and unnecessary expense and inconvenience. The power should be exercised by the tribunal in each case to achieve this purpose. The tribunal should not therefore issue ironclad blanket rulings that will apply in all proceedings before it. It may develop a practice or indicate a general course that it will follow but it should be prepared to apply its mind to the procedure to be followed in the circumstances of each particular case and having regard to the nature of the case.

Until it has developed some other practice adapted to its own type of case, a tribunal might commence each hearing with a conference with the parties. It should ascertain from the applicant, claimant or party who is opening the proceedings the course he proposes to follow with respect to the introduction of evidence. Much of the material to be put in evidence will have been made available to the other parties. The tribunal should find out how much is contested by them and endeavour where feasible to obtain the agreement of the parties to the proof of all formal or uncontested matters as expeditiously and cheaply as possible.

Where, however, the contested points at issue have been delineated, the tribunal may consider it desirable to require the parties to call witnesses to give the relevant evidence so that they may be cross-examined by opposing parties. On particular issues it may require the evidence to be limited to material admissible under the rules of evidence applied in the courts and to be given under oath.

The procedure ultimately adopted will to a great extent depend upon the nature of the issues and the nature of the functions of the tribunal.

(j) Adjournments

Section 21 of the Act provides:

> "21. A hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held."

A party applying for an adjournment is under the burden of establishing to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held. (See also p. 23).

(k) Recording of evidence

The Act does not require a tribunal to record the oral evidence given before it. A record of the evidence is however of importance where there is a right of appeal unless the appeal is by way of a hearing *de novo*. A record of oral evidence may also be useful in case of an application for judicial review. A tribunal should in so far as it is practicable adopt a practice of having oral evidence before it recorded.

A provision commonly found in many statutes dealing with hearings of tribunals is as follows:

> "The oral evidence taken before the Board at a hearing shall be recorded and, if so required, copies or a transcript thereof shall be furnished upon the same terms as in the Supreme Court."

Under this provision although the Board is required to cause the oral evidence to be recorded, it is under no duty to cause the evidence to be transcribed. It may do so for its own purposes. A party wishing a transcript of the evidence for the purposes of an appeal or for an application for judicial review must purchase the evidence from the reporter. A similar practice should be followed where the tribunal arranges for recording oral evidence although not required to do so.

The mode of recording evidence is not prescribed. Recording by a qualified court reporter or by any method approved under *The Evidence Act*, (R.S.O. 1970, c. 151) is the most desirable way to do so, but any mode of recording that can be shown to furnish an accurate record would be a compliance with a statutory requirement such as that quoted above.

(l) Maintenance of order at hearings

Section 9(2) of the Act provides as follows:

> "(2) A tribunal may make such orders or give such directions at a hearing as it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any such order or direction, the tribunal or a member thereof may call for the assistance of any peace officer to enforce the order or direction, and every peace officer so called upon shall take such action as is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose."

(m) Power to prevent abuse of tribunal's processes

Section 23(1) provides as follows:

> "23.—(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes."

(4) PROCEDURE AFTER HEARING.

(a) Making decision

The Act does not provide for the manner in which a tribunal is to make its decision. Where the tribunal consists of more than one person, the statute establishing it frequently provides for a quorum and for a decision by the majority of the quorum. In the absence of such a provision a majority of the members of the tribunal may make the decision (*The Interpretation Act*, R.S.O. 1970, c. 225, s. 27(*c*)).

Many statutes contain the following provision relating to the manner in which a tribunal must reach its decision:

> "No member of the Board shall participate in a decision of the Board pursuant to a hearing who was not present throughout the hearing and heard the evidence and argument of the parties, and except with the consent of the parties, no decision of the Board shall be given unless all members so present participate in the decision."

This section is probably merely a restatement of the law that applies to every tribunal even though not expressly included in the statute creating it. All tribunals should adhere to this rule as a matter of sound practice.

Provisions requiring members of a tribunal to refrain from communicating with a party or any person in the absence of the other party or the parties have already been discussed (see p. 12). This practice should be followed by all tribunals until they have reached a decision.

The decision should be the decision of the members of the tribunal. They cannot delegate the making of the decision to other persons such as a Registrar or subordinate official of the tribunal.

(b) Material upon which findings of fact required to be based

The Act does not expressly require that a tribunal base its findings of fact on the evidence put before it and on matters of which it may take notice without evidence. Except in special circumstances when its decision is based on broad policy considerations, a tribunal should however do so.

Many statutes provide expressly that the findings of fact of the tribunal are required to be based on evidence and on matters of which it may take notice. A typical provision is as follows:

> "The findings of fact of the Board pursuant to a hearing shall be based exclusively on evidence admissible or matters that may be noticed under sections 15 and 16 of *The Statutory Powers Procedure Act, 1971*."

Evidence admissible at a hearing under section 15 has been dealt with. Matters of which a tribunal may take notice are specified in section 16 of the Act which provides:

> "16. A tribunal may, in making its decision in any proceedings,
>
> (*a*) take notice of facts that may be judicially noticed; and
>
> (*b*) take notice of any generally recognized scientific or technical facts, information, or opinions within its scientific or specialized knowledge."

Where a tribunal proposes to take notice of facts, information or opinions under clause *b* without taking evidence on them, the sound practice for the tribunal to follow is to inform the parties at the hearing of such matters, if they are not already aware of them, and to give them an opportunity to contest them before the tribunal makes its decision.

(c) Legal grounds upon which decision required to be based

Where a statute specifies rules or standards upon which a tribunal is to base its decision, the tribunal should adhere strictly to the terms of the statute in making its decision. For example, section 6 of *The Children's Mental Health Centres Act* (R.S.O. 1970, c. 68), as re-enacted by section 20(1) of *The Civil*

Rights Statute Law Amendment Act, 1971, (S.O. 1971, c. 50) confers authority to revoke a licence where

. . . . .

"(*a*) the licensee or, where the licensee is a corporation, any officer, director or servant thereof, has contravened or has knowingly permitted any person under his control or direction or associated with him in the operation of the centre to contravene,

(i) any provision of this Act or the regulations or of any other Act or the regulations thereunder applying to the carrying on of the centre, or

(ii) any term or condition of the licence,

and such contravention occurred through lack of competence or with intent to evade the requirements of such provision or such term or condition;

(*b*) the premises or facilities in which the centre is operated do not comply with the requirements of this Act; or

(*c*) the centre is operated in a manner that is prejudicial to the health, safety or welfare of the children cared for therein."

A tribunal cannot go beyond these grounds and make an order revoking a licence on other grounds.

(d) Decision in writing

Section 17 provides that "a tribunal shall give its final decision and order, if any, in any proceedings in writing . . ."

A tribunal should adopt a form for its decisions that is self-contained in that it identifies the tribunal, the parties, shows that the matter for decision is within the authority of the tribunal and clearly expresses the decision. The reasons for the decision should not be contained in the formal decision.

(e) Reasons for decision

Section 17 provides that a tribunal "shall give reasons in writing (for its decision) if required by a party".

The reasons should set out a full explanation of the decision arrived at by the tribunal. Findings of fact should be stated separately from the propositions of law upon which the decision is based. Where in making its decision the tribunal takes into consideration matters of which it has taken notice under section 16(*b*), these should be set out in the reasons.

(f) Notice of decision

Section 18 of the Act provides:

"18. A tribunal shall send by first class mail addressed to the parties to any proceedings who took part in the hearing, at their addresses last known to the tribunal, a copy of its final decision and order, if any, in the proceedings, together with the reasons therefor, where reasons have been given, . . ."

Section 24 of the Act also provides in part:

"24.—(1) Where a tribunal is of opinion that because the parties to any proceedings before it are so numerous or for any other reason, it is impracticable, . . .

(*b*) to send its decision and the material mentioned in section 18,

to all or any of the parties individually, the tribunal may, instead of doing so, cause reasonable notice . . . of its decision to be given to such parties by public advertisement or otherwise as the tribunal may direct.

(2) A notice of a decision given by a tribunal under clause *b* of subsection 1 shall inform the parties of the place where copies of the decision and the reasons therefor, if reasons were given, may be obtained."

(g) Record of proceedings

Section 20 of the Act requires a tribunal to compile a record of any proceedings in which a hearing has been held which shall include:

(*a*) any application, complaint, reference or other document, if any, by which the proceedings were commenced;
(*b*) the notice of any hearing;
(*c*) any intermediate orders made by the tribunal;
(*d*) all documentary evidence filed with the tribunal, subject to any limitations expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceedings;
(*e*) the transcript, if any, of the oral evidence given at the hearing; and
(*f*) the decision of the tribunal and the reasons therefor, where reasons have been given.

Although a tribunal is not required to obtain a transcript of the oral evidence, if it has done so, the transcript is required to be included in the record. Similarly if the tribunal either at the request of the parties or on its own initiative has given reasons for its decision, they are also to be included.

Under clause *d* where documentary evidence has been received under section 15(3) that is for the exclusive use of the tribunal only and not available to all the parties, such evidence should be included in the record, but in a sealed envelope and marked as such.

4. Relation of Minimum Rules to procedural rules of natural justice.

The Minimum Rules supplant the procedural rules of natural justice in proceedings to which they apply on matters dealt with by them. The underlying concept of the procedural rules of natural justice—that all parties who may be affected by a decision should have a fair opportunity to participate effectively in the proceedings to protect their interests—may, however, still be relevant in two ways:

(1) to the application of the Minimum Rules, and
(2) to procedure in matters not dealt with in the Minimum Rules.

(1) Relevance to application of Minimum Rules

Section 21 of the Act affords an illustration. It provides:

"21. A hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held."

Although this provision only gives a power to the tribunal to adjourn proceedings, it should not refuse an adjournment and insist that the hearing go on, where a party will be prejudiced. On the other hand, grounds for an adjournment should be substantial and an adjournment should not be allowed to be used as a device for causing delay. The governing consideration of fairness that underlies the procedural rules of natural justice should be given effect to by the tribunal in exercising its power.

(2) PROCEDURE ON MATTERS NOT DEALT WITH BY MINIMUM RULES

Where the Minimum Rules make no provision on a procedural matter and the tribunal is not governed by any other statutory provisions or rules, it is within its power to prescribe its procedure.

An illustration is afforded by the absence from the Minimum Rules of any provisions as to the order of proceeding at a hearing. Unless the statute establishing the tribunal does so, the tribunal may determine this. The order of proceeding adopted by the tribunal should afford to the parties reasonable opportunities to present their cases and to answer the cases on the other side as expeditiously and cheaply as possible. In general, the person asserting a claim for relief should commence the hearing and the person from whom the relief is claimed should then have an opportunity to answer the claim. The tribunal may however, in special circumstances, be of opinion that a different order of proceedings should be adopted but in doing so it should adhere to the concept underlying the rules of natural justice.

McRuer Vol. 1, p. 136, chapter 11 "Administrative Procedure in Ontario: Present Law", particularly pp. 144 et seq. "Requirements of *audi alteram partem*". Can. Abr. Vol. 1, p. 201.

5. Enforcement of orders of tribunals.

Where a tribunal makes an order requiring some action to be taken by a party, the order may be filed in the office of the Registrar of the Supreme Court by the tribunal or by a party. If it is an order for the payment of money it may be enforced at the instance of the tribunal or of such party in the name of the tribunal in the same manner as a judgment of the court. Under this provision a Writ of Execution in the name of the tribunal may be issued and delivered to the Sheriff for execution.

Where the order is not for the payment of money but requires other action to be taken, application may be made by the tribunal or the party filing the order to the court for such order to enforce it as the court may consider just. The detailed provisions for enforcement are contained in section 19.

6. Appeals from decisions of tribunals.

The general rule is that no appeal may be taken from a decision of a tribunal unless a right of appeal is expressly given by statute.

The Statutory Powers Procedure Act, 1971 does not confer a right of appeal from a decision of any tribunal. If there is a right of appeal, it must be found in the statute establishing the tribunal or some other statute. A typical provision for an appeal is as follows:

"(1) Any party to proceedings before the tribunal may appeal from its decision or order to the Supreme Court in accordance with the rules of court.

(2) Where any party appeals from a decision of the tribunal, the tribunal shall forthwith file in the Supreme Court the record of the proceedings before it in which the decision was made, which, together with the transcript of the evidence if it is not part of the tribunal's record, shall constitute the record in the appeal.

(3) The Minister is entitled to be heard, by counsel or otherwise, upon the argument of an appeal under this section.

(4) An appeal under this section may be made on questions of law or fact or both and the court may exercise all the powers of the tribunal, and for such purpose the court may substitute its opinion for that of the Registrar or of the tribunal, or the court may refer the matter back to the tribunal for rehearing, in whole or in part, in accordance with such directions as the court considers proper."

Where an appeal is given to the Supreme Court in the language of this provision, section 17 of *The Judicature Act*, (R.S.O. 1970, c. 228, as re-enacted by S.O. 1971, c. 57) requires the appeal to be heard by the Divisional Court of the High Court of Justice for Ontario.

In the provision quoted above, the appeal is open on all "questions of law or fact or both". The Divisional Court is given full power to make a new decision on the basis of the record and argument of the parties and for such purpose may exercise all the powers of the tribunal.

The scope of the appeal may be restricted by the statute providing for the appeal, e.g., to "any question that is not a question of fact alone". The scope of the powers of the Divisional Court or any other appellate body on an appeal is always determined by the terms of the legislation conferring the right of appeal.

The time for bringing an appeal may be fixed in the statute providing for the appeal or may be fixed in the rules of court. An important provision that may govern the commencement of the period during which an appeal may be brought is contained in section 18 of the Act. After providing that a tribunal shall send notice of its decision to the parties, that section continues:

> . . . "each party shall be deemed to have received a copy of the decision or order on the fifth day after the day of mailing unless the party did not, acting in good faith, through absence, accident, illness or other cause beyond his control receive the copy of the decision or order until a later date."

Where a party brings himself within the exception as not having received the copy of the decision or order until a later date, the actual date of receipt would appear to govern.

Section 25 of the Act provides:

> "25.—(1) Unless it is expressly provided to the contrary in the Act under which the proceedings arise, an appeal from a decision of a tribunal to a court or other appellate tribunal operates as a stay in the matter except where the tribunal or the court or other body to which the appeal is taken otherwise orders.
>
> (2) An application for judicial review under *The Judicial Review Procedure Act, 1971*, or the bringing of proceedings specified in subsection 1 of section 2 of that Act is not an appeal within the meaning of subsection 1."

The statute creating the tribunal may specifically provide that the appeal does not stay proceedings.

Although under subsection 2 an application for judicial review under *The Judicial Review Procedure Act, 1971,* is not an appeal and therefore does not stay the proceedings, that Act (section 4, see p. 51) provides that the court to which the application for judicial review is made may make such interim orders as it considers advisable. Such an interim order might stay the proceedings.

7. Miscellaneous matters concerning tribunals.

(1) DOCTRINE OF FUNCTUS OFFICIO.

Under this doctrine when a tribunal has conducted its hearing and has arrived at and delivered its final decision and order, the tribunal can take no further action —the powers of its office are exhausted. It cannot therefore change its decision or vary it in any way.

Because of the strictness of this rule many statutes provide that a tribunal may reopen its decision and vary it or may make a new decision. In the absence of such a provision a tribunal cannot do so.

The correction of obvious clerical errors probably does not offend against this rule.

(2) PRIVILEGE AGAINST ACTIONS FOR LIBEL OR SLANDER

Members of a tribunal, witnesses and counsel are protected from actions for libel or slander for words written or spoken in the course of the proceedings by what is called "qualified privilege". The privilege is not an absolute one but exists so long as the words are spoken or written in the course of proceedings within the jurisdiction of the tribunal and without any malicious or wrongful intent. The privilege may be lost where a member of a tribunal, or a counsel or witness seizes the opportunity to libel or slander a person maliciously.

8. Statutory Powers Procedure Rules Committee established under Part II of the Act.

The Committee consists of seven members. The Chairman is the Deputy Minister of Justice and Deputy Attorney General. The other members are designated in the statute or are appointed by the Lieutenant Governor in Council.

The functions of the Committee are twofold.

The Minimum Rules in Part I of the Act apply to proceedings of tribunals required to hold hearings in exercising powers of decision. The Committee is required to maintain under continuous review the practice and procedure of these tribunals with a view to their improvement. The Committee is given no power to make procedural rules, but power to make rules additional to the rules in Part I is usually conferred by a statute creating a tribunal. The Committee is required to be consulted whenever such additional rules are made and may require such rules to be formulated.

The Committee is also required to maintain under review proceedings of the following tribunals to which Part I does not apply:

(*a*) tribunals upon which statutory powers of decision are conferred, but which are not required to hold hearings;

(*b*) tribunals not exercising a power of decision, but authorized to make inquiries and investigations and to make a report and recommendation; and

(*c*) coroners.

Generally the procedural rules of natural justice do not apply to these tribunals and Part I of *The Statutory Powers Procedure Act, 1971,* is not made applicable to them. The function of the Committee is to require appropriate rules of procedure to be adopted for the proceedings of these tribunals in so far as is practicable. The

Committee may require the tribunals to formulate and report to the Committee rules to govern their proceedings.

The general object of establishing the Committee is to encourage tribunals to have rules of procedure to ensure that a fair procedure is followed in the exercise of every statutory power of decision or of inquiry and investigation wherever this is practicable.

PART II

The Public Inquiries Act, 1971
(S.O. 1971, c. 49)

1. General purpose of Act.

The predecessor of this Act (*The Public Inquiries Act,* R.S.O. 1970, c. 379), was the statute under which Royal Commissions were constituted to conduct inquiries. Sections 1 and 2 of that Act conferred authority for the appointment of commissioners and defined their powers:

> "1. Whenever the Lieutenant Governor in Council considers it expedient to cause inquiry to be made concerning any matter connected with or affecting the good government of Ontario or the conduct of any part of the public business thereof or of the administration of justice therein and such inquiry is not regulated by any special law, he may, by commission, appoint one or more persons to conduct such inquiry and may confer the power of summoning any person and requiring him to give evidence on oath and to produce such documents and things as the commissioner or commissioners consider requisite for the full investigation of the matters into which he or they are appointed to examine.
>
> 2. A commissioner has the same power to enforce the attendance of witnesses and to compel them to give evidence and produce documents and things as is vested in any court in civil cases."

These two sections were the main provisions.

The powers which might be conferred on a commissioner under *The Public Inquiries Act* had a wider application than to inquiries instituted under that Act. Many other statutes providing for investigations or inquiries by boards or commissions, or individuals such as directors, investigators and inspectors, conferred powers of investigation or inquiry by using words such as "the powers that may be conferred on a commissioner under *The Public Inquiries Act*" or "the powers of a commissioner under *The Public Inquiries Act.*" For example, under *The Athletics Control Act* (R.S.O. 1970, c. 35) the Minister may direct the Athletics Commissioner or any person to hold an investigation into matters affecting, among other things, amateur sport in Ontario. Section 8 of that Act then provides:

> "8. For the purposes of an investigation . . . the Commissioner or other person holding such investigation possesses all the powers that may be conferred upon a commissioner under *The Public Inquiries Act.*"

Other statutes providing for investigations used different language to achieve the same effect. For example a supervisory officer appointed under *The Schools Administration Act* (R.S.O. 1970, c. 424), by the Minister or by a board, to inspect and report on schools was given power by section 70(4) in the following terms:

> "(4) Where a supervisory officer requires the testimony of a witness as to any alleged fact in any complaint or appeal made to him or to the Minister, he may administer an oath to the witness and he has the like power to take evidence and to enforce the attendance of witnesses and the production of documents as a court has in civil cases."

Experience has demonstrated that a revision of *The Public Inquiries Act* was advisable to clarify and amplify its provisions and in some respects to restrict the powers conferred by it.

Doubts have been expressed as to the precise scope of the authority of the Lieutenant Governor in Council to cause inquiries to be made. The Act contained no provisions regulating the procedure to be followed by or the evidence that might be given before commissioners. Where powers conferred on a commissioner included powers "vested in any court in civil cases" the commissioner had power to punish for contempt or to issue bench warrants for arrest and detention of witnesses without any judicial supervision. The appropriateness of these powers was particularly questionable when they were conferred by reference in another statute on investigators or inspectors. The powers of the Court of Appeal on a stated case, to which reference will be made later, to inquire into the "validity" of acts of a commissioner were uncertain. The privative clause of the statute that "no action shall be brought or other proceeding taken" with respect to anything done or sought to be done by a commissioner was unduly restrictive of judicial control over inquiries.

The purpose of *The Public Inquiries Act, 1971,* is to clarify and in some cases restrict the powers exercised by commissioners appointed under the Act and powers conferred on others by reference to the Act.

The Act is divided into three parts.

Part I redefines the scope of authority for the appointment of Royal Commissions and enacts certain provisions governing their procedure.

Part II deals with powers of Royal Commissions with respect to witnesses and evidence. These powers are of such a nature that they may be adopted by reference so as to be applicable to inquiries and investigations under other statutes.

Part III authorizes the Lieutenant Governor in Council to confer certain special powers on Royal Commissions in appropriate cases.

2. Authority for appointment of commissions.

Although section 1 of the former Act clearly empowered the Lieutenant Governor in Council to cause inquiries to be made into matters affecting government operations and the conduct of existing public business, doubts were expressed as to whether a Royal Commission could be appointed to inquire into matters of public concern not involving any matter of current public business at the time of the inquiry, but which might lead to future legislation or the expansion of public business.

Section 2 of *The Public Inquiries Act*, 1971 (referred to in this part of this manual as the "Act" unless the context otherwise requires) provides:

> "2. Whenever the Lieutenant Governor in Council deems it expedient to cause inquiry to be made concerning any matter connected with or affecting the good government of Ontario or the conduct of any part of the public business thereof or of the administration of justice therein or that he declares to be a matter of public concern and the inquiry is not regulated by any special law, he may, by commission, appoint one or more persons to conduct the inquiry."

The revised section extends the powers of the Lieutenant Governor in Council so that a commission may be appointed to inquire into "any matter . . . that he declares to be a matter of public concern . . . "

3. Scope of inquiry.

The powers of a commission appointed under the Act are limited to inquiring into matters defined by the terms of reference establishing the commission. The terms of reference of a commission may be very wide requiring it to inquire into matters of broad public policy and to make recommendations with a view to formulating future government action. They may however be quite narrow and confined to the investigation of and reporting on specific allegations of wrongdoing. Any question as to the scope of the inquiry may be made the subject matter of a stated case under section 6 of the Act discussed later. If the commission proposes or purports to use its powers to inquire into matters outside its terms of reference, an application for judicial review under *The Judicial Review Procedure Act, 1971* may be brought in proper cases to restrain its proceedings from going beyond the authorized inquiry.

4. Procedure.

(1) GENERAL RULE.

Since a commission makes no decision deciding or prescribing the rights of persons there are no parties to the inquiry in the sense in which persons whose rights may be decided are parties to proceedings in the exercise of a power of decision. A procedure such as that laid down by *The Statutory Powers Procedure Act, 1971*, designed mainly for the protection of parties in this sense and their rights cannot be applied to inquiries. Furthermore, the subject matter of inquiries varies so extensively that the procedure for each inquiry must be flexible and left substantially to the commission conducting each inquiry. Section 3 of the Act provides:

> "3. Subject to sections 4 and 5, the conduct of and the procedure to be followed on an inquiry is under the control and direction of the commission conducting the inquiry."

Sections 4 and 5 are dealt with later.

Where the inquiry is directed at a broad and general matter of policy, the procedure should be designed to obtain as much information as possible on the subject matter. The general practice has been for the commission to advertise its hearings and also to give notice of the hearing specifically to persons and organizations that will be in a position to furnish useful information or who have an interest in the outcome of the inquiry. Where the inquiry is into specific allegations of wrongdoing, the commission should take care that notice be given to all persons against whom such allegations or charges have been made. The procedure to be adopted on such an inquiry as far as is practicable should conform to the procedure established by *The Statutory Powers Procedure Act, 1971*.

Section 5(2) of the Act, discussed later, prohibits the commission from making any finding of misconduct on the part of any person unless he has reasonable notice of the substance of the misconduct and is allowed a full opportunity during the inquiry to be heard in person or by counsel.

(2) PUBLIC HEARINGS.

Since inquiries are generally concerned with matters of public interest, the usual practice has been for a commission to hold public hearings. Generally the same principle that applies to the courts and to tribunals exercising powers of decision applies to hearings by Royal Commissions namely, hearings should be public for the protection of the public interest. Section 4 of the Act recognizes that principle.

> "4. All hearings on an inquiry are open to the public except where the commission conducting the inquiry is of the opinion that,
>
> (*a*) matters involving public security may be disclosed at the hearing; or
>
> (*b*) intimate financial or personal matters or other matters may be disclosed at the hearing that are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,
>
> in which case the commission may hold the hearing concerning any such matters *in camera*."

Clause *b* is designed to protect the interests of persons who furnish confidential information such as trade processes or financial matters, for the use of the commission. The principle applicable has already been discussed (ante p. 14).

(3) PROTECTION OF PERSONS AFFECTED

Although rights are not decided in the report of a commission, many persons have a direct interest in the outcome or the course of the inquiry. If such persons can demonstrate that they have a substantial and direct interest in the subject matter of an inquiry they should have a right to take part in it to the extent necessary to protect their interests. Section 5(1) provides:

> "5.—(1) A commission shall accord to any person who satisfies it that he has a substantial and direct interest in the subject matter of its inquiry an opportunity during the inquiry to give evidence and to call and examine or to cross-examine witnesses personally or by his counsel on evidence relevant to his interest."

Persons who have the most direct and substantial interest in an inquiry are persons whose conduct is being investigated and against whom findings of misconduct may be made in the report. Section 5(2) specifically provides:

> "(2) No finding of misconduct on the part of any person shall be made against him in any report of a commission after an inquiry unless that person had reasonable notice of the substance of the misconduct alleged against him and was allowed full opportunity during the inquiry to be heard in person or by counsel."

5. Stated cases.

Under section 5 of the former Act, a case might be stated to the Court of Appeal where the "validity" of any act of a commissioner was called into question. The term "validity" is ambiguous in that it may refer either to the authority for or to the propriety of the particular act. The provision was interpreted to authorize the Court of Appeal to deal with the propriety of the proceedings so as to afford protection to persons affected. Since such protection is now dealt with expressly

in the statute, the powers of the court have been restricted to dealing with matters of authority. The stated case now goes to the new Divisional Court of the Supreme Court of Ontario. Section 6(1), (2) and (3) provide:

> "6.—(1) Where the authority to appoint a commission under this Act or the authority of a commission to do any act or thing proposed to be done or done by the commission in the course of its inquiry is called into question by a person affected, the commission may of its own motion or upon the request of such person state a case in writing to the Divisional Court setting forth the material facts and the grounds upon which the authority to appoint the commission or the authority of the commission to do the act or thing are questioned.
>
> (2) If the commission refuses to state a case under subsection 1, the person requesting it may apply to the Divisional Court for an order directing the commission to state such a case.
>
> (3) Where a case is stated under this section, the Divisional Court shall hear and determine in a summary manner the question raised."

Under the former *Public Inquiries Act* where a case was stated, no further proceedings in the inquiry could be taken pending decision of the stated case. This frequently delayed inquiries into matters not involved in the stated case.

Section 6(4) provides:

> "(4) Pending the decision of the Divisional Court on a case stated under this section, no further proceedings shall be taken by the commission with respect to the subject matter of the stated case but it may continue its inquiry into matters not in issue in the stated case."

The provision contained in the former *Public Inquiries Act* providing that no action should be brought or other proceedings taken with respect to anything done or sought to be done by a commission is omitted from the new Act conforming with the policy of not restricting judicial review of statutory powers.

6. Evidence.

The former Act contained no provision on evidence. The practice on inquiries was for the commission to receive and to endeavour to obtain any material relevant to the subject matter of its inquiry regardless of its nature or admissibility under the general law of evidence. In general, this position remains unchanged.

The powers of a commission have been clarified with respect to the taking of evidence under oath. Section 10 of the Act provides:

> "10. A commission may admit at an inquiry evidence not given under oath or affirmation."

Section 13 of the Act provides:

> "13. A commission has power to administer oaths and affirmations for the purpose of an inquiry and may require evidence before it to be given under oath or affirmation."

A commission therefore has power to admit evidence not under oath or affirmation or to require evidence to be given under oath or affirmation. The way in which this power should be exercised is a matter that is left for decision by the commission in the particular circumstances of the case and having regard to the nature of the issue to which the evidence relates. A similar discretion conferred on

the tribunals to which *The Statutory Powers Procedure Act, 1971*, is discussed ante p. 17.

One express restriction is imposed on the admissibility of evidence. Section 11 provides:

> "11. Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence."

7. Powers of compulsion: witnesses: documents.

For the purpose of compelling the giving of evidence or the production of documents, a commission formerly had the powers of a court in civil matters which empowered the commission itself to issue bench warrants for the arrest and detention of witnesses or to punish for contempt for a failure to attend or give evidence or to produce documents. The powers of a commission are now specifically set out in Part II of the Act and are made subject to judicial control. Section 7 of the Act provides:

> "7.—(1) A commission may require any person by summons,
> (*a*) to give evidence on oath or affirmation at an inquiry; or
> (*b*) to produce in evidence at an inquiry such documents and things as the commission may specify,
>
> relevant to the subject matter of the inquiry and not inadmissible in evidence at the inquiry under section 11.
>
> (2) A summons issued under subsection 1 shall be in Form 1 and shall be served personally on the person summoned and he shall be paid at the time of service the like fees and allowances for his attendance as a witness before the commission as are paid for the attendance of a witness summoned to attend before the Supreme Court."

The form of summons is set out in the statute:

Summons to Witness

Re:

To:

You are hereby summoned and required to attend before the .....
..... (name of commission) at an inquiry conducted by the said commission to be held at .....
in the ..... of .....
on ..... day, the ..... day of .....,
19 ..... at the hour of ..... o'clock in the ..... noon (local time) and so from day to day until the inquiry is concluded or the commission otherwise orders, to give evidence on oath touching the matters in question in the inquiry and to bring with you and produce at such time and place .....
.....
.....

Dated this ..... day of ....., 19 .....

..... (Name of Commission)

....
Commissioner

Note:

You are entitled to be paid the same personal allowances for your attendance at the hearing as are paid for the attendance of a witness summoned to attend before the Supreme Court.

If you fail to attend and give evidence at the inquiry, or to produce the documents or things specified, at the time and place specified, without lawful excuse, you are liable to punishment by the Supreme Court of Ontario in the same manner as if for contempt of that Court for disobedience to a subpoena.

The commission is empowered under section 8 to state a case to the Divisional Court where any person without lawful excuse,

"(*a*) on being duly summoned under section 7 as a witness at an inquiry, makes default in attending at the inquiry; or

(*b*) being in attendance as a witness at an inquiry, refuses to take an oath or to make an affirmation legally required by the commission to be taken or made, or to produce any document or thing in his power or control legally required by the commission to be produced to it, or to answer any question to which the commission may legally require an answer; or

(*c*) does any other thing that would, if the commission had been a court of law having power to commit for contempt, have been contempt of that court . . ."

Power is conferred on the Divisional Court to punish such person in a proper case in the same manner as if he had been guilty of contempt of court.

8. Protection of witnesses.

Automatic protection is afforded to a witness who gives an answer to a question that may tend to criminate him or to establish his liability to civil proceedings. Section 9(1) provides:

"9.—(1) A witness at an inquiry shall be deemed to have objected to answer any question asked him upon the ground that his answer may tend to criminate him or may tend to establish his liability to civil proceedings at the instance of the Crown or of any person, and no answer given by a witness at an inquiry shall be used or be receivable in evidence against him in any trial or other proceedings against him thereafter taking place, other than a prosecution for perjury in giving such evidence."

As the authorities now stand, the automatic protection is constitutionally limited to proceedings relating to provincial offences or civil proceedings and does not apply to prosecutions for criminal offences. The witness must claim protection in such prosecutions under section 5 of the *Canada Evidence Act*. Section 9(2) provides:

"(2) A witness shall be informed by the commission of his right to object to answer any question under section 5 of the *Canada Evidence Act*."

9. Release of documents.

To minimize inconvenience to persons who have produced documents or things in evidence section 12 provides:

"12.—(1) Documents and things produced in evidence at an inquiry shall, upon request of the person who produced them or the person entitled thereto, be released to him by the commission within a reasonable time.

(2) Where a document has been produced in evidence before a commission, the commission may or the person producing it may with the leave of the commission, cause the document to be photocopied and the photocopy may be filed in evidence in the place of the document produced, and a document purporting to be a copy of a document produced in evidence, certified to be a true copy thereof by the commission, is admissible in evidence in proceedings in which the document produced is admissible, as evidence of the document produced."

10. Special powers of commissions: bench and search warrants.

Certain special powers may be conferred on commissions by Part III of the Act. This Part does not apply automatically to all inquiries. It applies to an inquiry only if the Lieutenant Governor in Council declares that it shall apply. (Section 15).

Where the Part applies, a commission may apply to a judge of a county or district court to obtain a bench warrant for the apprehension and detention of a witness who is required to give evidence before the inquiry. (Section 16). This power, which is in addition to the power to punish for contempt given under Part II, could be utilized where the actual presence of the witness is required for the purposes of the inquiry. The Part also authorizes the commission to appoint an investigator who may apply to the judge of a county or district court to obtain a search warrant to enter and search buildings or places for documents or things. (Section 17).

11. Application of The Public Inquiries Act, 1971, to investigations and inquiries under other statutes.

As indicated at the outset of this Part many statutes authorizing investigations or inquiries contained provisions conferring on the person or persons conducting the investigation or inquiry the powers of a commissioner under *The Public Inquiries Act*. In some instances the powers of a court in civil cases were conferred on such persons. These powers include the power to issue bench warrants or to impose punishment for contempt.

In the future, powers conferred on such persons will be the powers conferred by Part II of *The Public Inquiries Act, 1971*. These powers include the power to issue summonses to witnesses to attend to testify or to produce documents or things and to apply to a court for the imposition of punishment for contempt for disobedience to the summons. The power is therefore subject to judicial control. No power is conferred to issue bench warrants for arrest and detention for the purpose of such an investigation.

A typical provision enacted by *The Civil Rights Statute Law Amendment Act, 1971* (S.O. 1971, c. 50) is the following re-enactment of section 5 of *The Department of Tourism and Information Act* (R.S.O. 1970, c. 122):

"5. The Minister may by order appoint one or more persons to investigate, inquire into and report to him upon any matter connected with or affecting the tourist industry, including accommodation, facilities, or services offered to tourists or the advertising or publicizing thereof, or of the resources, attractions or advantages of Ontario, and, for the purposes of the investigation and inquiry, any person making the investigation has the powers of a commission under Part II of *The Public Inquiries Act, 1971*, which Part applies to the investigation as if it were an inquiry under that Act."

As a transitional measure pending revision of the relevant statutory provisions, section 18 of *The Public Inquiries Act, 1971,* enacts as follows:

> "18. Where, for the purpose of an investigation, inquiry or matter under any Act or regulation, any person or body is given the powers of or that may be conferred on a commissioner under *The Public Inquiries Act* or the powers of a court in civil cases, on and after the day this Act comes into force such person or body may exercise the powers of a commission under Part II of this Act, which Part applies to such investigation, inquiry or matter as if it were an inquiry under this Act."

PART III

The Judicial Review Procedure Act, 1971
(S.O. 1971, c. 48)

1. General purpose of Act.

Generally an individual is entitled to apply to the courts to obtain an order compelling the performance of a public duty owed to him. He is also entitled to seek the protection of the courts against unauthorized action proposed to be taken or taken in the exercise or purported exercise of a power affecting his rights. Such a power may be of several types, e.g.,

to make regulations;

to make decisions prescribing or deciding rights of an individual;

to impose a requirement on an individual to do or to refrain from doing a particular act; or

to take action invading the rights of an individual.

Proceedings in the courts to obtain such an order or such protection have been called, collectively, proceedings for judicial review.

Until *The Judicial Review Procedure Act, 1971* (which is referred to in this part of this manual as the "Act" unless the context otherwise requires) was passed, five forms of proceedings could be brought to obtain judicial review namely:

applications for orders in the nature of
    mandamus,
    prohibition or
    certiorari, and

actions for
    declarations, or
    injunctions.

This multiplicity of proceedings has always given rise to unnecessary complexity with serious disadvantages.

Proceedings to compel the performance of a public duty could be brought by way of an application for an order in the nature of mandamus. Little difficulty existed with respect to these applications taken by themselves. But some difficulties arose where it was necessary or desirable to bring such an application in conjunction with other proceedings for judicial review.

Proceedings for judicial review concerning exercise of powers of decision could be brought by way of applications for prohibition or certiorari or by way of actions for declarations or injunctions. Each of these proceedings was available only in limited circumstances. Applications for prohibition or certiorari could be brought only in relation to the exercise or the proposed or purported exercise of "judicial" and "quasi judicial" powers. For "purely administrative" powers actions for declarations or injunctions had to be brought. As already indicated (see p. 2) no clear lines of distinction have ever been drawn between these types of powers. Nevertheless, since the forms of proceedings were not interchangeable, a proposed litigant had to decide first whether the power involved was "judicial" or "quasi

judicial" or was "purely administrative" to determine the correct form of proceeding. If he chose the wrong form of proceedings they would be dismissed without considering the merits of his claim. Even though he had valid grounds for relief, he had to bring new proceedings in correct form to obtain the relief, with consequent delay and expense.

The choice of the correct form of proceedings could not be avoided by bringing all possible alternative forms of proceedings simultaneously so that at least one of them would be correct because for procedural reasons, many of the forms of proceedings could not be joined, e.g., an application for an order in the nature of certiorari could not be joined with an action for a declaration.

The technical requirements varied with the form of the proceeding. Certiorari or prohibition proceedings could be brought in relation to a body not incorporated as a legal person. An action for a declaration or injunction requires that the defendant have a legal personality and therefore such an action could not be brought against an unincorporated body, e.g., the Ontario Securities Commission.

The multiplicity of forms or proceedings produced other anomalies. For example, an application for prohibition could be disposed of summarily and relatively inexpensively on application by way of originating notice; but an application for an injunction required an action commenced by writ and a full scale trial. In certiorari proceedings, the decision of a tribunal would be set aside for error of law on the face of the record, but it has not yet been established that this ground for relief was available in actions for a declaration.

The choice of proceedings concerning the validity of regulations or directions to individuals to take certain action, or the authority to take action invading rights of an individual, did not give rise to as many difficulties as the choice of proceedings concerning powers of decision. The appropriate form of proceedings for a direct attack was, in general, an action for a declaration or injunction or both. However, the exercise of a power of decision often required the application of regulations or resulted in giving a direction to a person or in authorizing action to invade his rights. If the validity of or authority for the regulation, direction or action was to be attacked, the decision also often had to be attacked with the resultant difficulties outlined above.

The purpose of *The Judicial Review Procedure Act, 1971* is to replace the five former forms of proceedings for judicial review with a single summary form of proceedings under which relief available in any one or more of the former proceedings can be obtained. The objective is to eliminate the need to choose a correct proceeding and to overcome technical problems outlined above, e.g., inability to join claims for relief. In addition, certain minor changes are made in the grounds upon which relief may be granted to render them uniform and to extend them in one respect.

2. Scope of applications for judicial review.

Section 2(1) of the Act provides:

> "2.—(1) On an application by way of originating notice, which may be styled 'Notice of Application for Judicial Review', the court may, notwithstanding any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:
>
> 1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.

2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power."

Relief by way of mandamus, prohibition or certiorari could be obtained in relation to statutory duties or powers. In theory at least and possibly still in rare residual instances, relief could also be obtained in some of these applications in matters not relating to statutory duties or powers, e.g., in relation to duties or powers that exist at common law.

Actions for declarations or for injunctions could always be brought for many purposes and were not restricted to obtaining relief in relation to statutory powers.

The primary objective of section 2(1) is to establish a single form of proceeding relating to the performance or exercise of statutory duties and powers. The scope of the single form of proceedings is not so limited however. Paragraph 2 dealing with actions for declarations or injunctions relates only to statutory powers, but paragraph 1 empowers the court on the new application to grant any relief that the applicant would be entitled to in mandamus, prohibition or certiorari proceedings without being limited to granting relief in relation to the exercise or purported exercise of a statutory duty or power. Further, section 7 provides:

"7. An application for an order in the nature of mandamus, prohibition or certiorari shall be deemed to be an application for judicial review and shall be made, treated and disposed of as if it were an application for judicial review."

The result is the new application wholly supplants proceedings by way of mandamus, prohibition and certiorari for all purposes.

The scope of an application for judicial review is given greater precision by two definitions.

"Statutory power" is defined by section 1(*g*) as follows:

"(*g*) 'statutory power' means a power or right conferred by or under a statute,
(i) to make any regulation, rule, by-law or order, or to give any other direction having force as subordinate legislation,
(ii) to exercise a statutory power of decision,
(iii) to require any person or party to do or to refrain from doing any act or thing, that, but for such requirement, such person or party would not be required by law to do or to refrain from doing,
(iv) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party."

The expression "statutory power of decision" used in this provision is defined in section 1(*f*) as follows:

"(*f*) 'statutory power of decision' means a power or right conferred by or under a statute to make a decision deciding or prescribing,
(i) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
(ii) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether he is legally entitled thereto or not,
and includes the powers of an inferior court."

The operation of the substantially similar definition in *The Statutory Powers Procedure Act, 1971* is discussed ante pp. 3-4.

The power conferred on the court by section 2(1) to grant any relief on an application for judicial review that the applicant would be entitled to "in any one or more" of the enumerated proceedings is significant in two ways.

The distinction between "judicial" or "quasi judicial" powers and "purely administrative" powers of decision is now no longer a relevant consideration when commencing proceedings seeking judicial review. The application is in the same form by an originating notice no matter what the nature of the power may be. In it the applicant need only allege a ground that would have entitled him to relief under any of the former proceedings or coming within the enlarged grounds provided under the Act (i.e., error of law or absence of evidence see p. 47 below).

Since the court may grant relief available in one or more of the enumerated proceedings, claims for relief that might have been granted under more than one of the former proceedings now may be joined in one application. Such claims for relief could not be joined under the former procedure. For example, under the former procedure if it was desired to quash an improper decision of a tribunal and to compel it to make a new decision, it was necessary to bring two applications. Certiorari proceedings would have to be brought to quash the decision and mandamus proceedings to order the tribunal to proceed to make a new decision. Claims for both these reliefs may now be made in a single application.

3. Limitations on applications for judicial review.

Three major limitations that applied to the proceedings enumerated in section 2(1) continue to apply to the new application for judicial review.

(1) Superior Courts, Parliament, Legislature and Her Majesty.

Since the new application may be brought only to claim relief that the applicant would be entitled to in any of the enumerated proceedings, the application cannot be brought where the enumerated proceedings could not have been brought. None of the enumerated proceedings could be brought to review the proceedings of a Superior Court or of Parliament or the Legislature or actions of Her Majesty. Relief may be obtained against officers of the Crown upon whom statutes directly impose duties or confer powers but not where the duty or power was imposed or conferred directly on the Crown or a servant acting on behalf of Her Majesty.

1 Can. Abr. p. 135
13 C. E. D. p. 154; 17 C. E. D. p. 326
de Smith p. 390; 527; 574

(2) Privative clauses.

A privative clause or other provision in a statute limiting the scope of review under any of the enumerated proceedings applies to the new application.

This would appear to be implicit in section 2(1) and it is expressly provided in section 12(1) of the Act:

> "12.—(1) Subject to subsection 2, where reference is made in any other Act or in any regulation, rule or by-law to any of the proceedings enumerated in subsection 1 of section 2, such reference shall, after the coming into force of this Act, be read and construed to include a reference to an application for judicial review."

Section 12(2) on habeas corpus proceedings is dealt with later.

Section 97 of *The Labour Relations Act* (R.S.O. 1970, c. 232), is a typical privative clause:

"97. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings."

The effect of section 12(1) is that the reference in section 97 to proceedings by way of "injunction, declaratory judgment, certiorari, mandamus, prohibition . . ." includes a reference to proceedings by way of an "application for judicial review". Limitations imposed by that section on the former proceedings apply equally to applications for judicial review.

For authorities on statutory restrictions on judicial review see:

1 Can. Abr. pp. 246-256 de Smith pp. 340-361.
Reid pp. 179-208

(3) MOTIONS TO QUASH UNDER SECTION 69 OF JUDICATURE ACT.

Section 69(1) of *The Judicature Act* (R.S.O. 1970, c. 228) provides:

"69.—(1) Where it is desired to move to quash a conviction, order, warrant or inquisition, the proceeding shall be by motion in the first instance instead of by certiorari, rule or order nisi".

This provision applies to convictions, orders or warrants made or issued by a provincial judge or to inquisitions by a coroner.

By virtue of section 12(1) of *The Judicial Review Procedure Act, 1971*, the reference in this provision to "certiorari" includes a reference to an "application for a judicial review". The effect of the section is therefore that where it is desired to quash a conviction, order, warrant, or inquisition to which section 69(1) of *The Judicature Act* applies, the proceedings shall be by motion to quash in the first instance "instead of by certiorari, application for judicial review, rule or order nisi".

4. Applications for judicial review made to Divisional Court: Exception: Appeals.

Section 6 provides:

"6.—(1) Subject to subsection 2, an application for judicial review shall be made to the Divisional Court.

(2) An application for judicial review may be made to the High Court with leave of a judge thereof, which may be granted at the hearing of the application, where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice.

(3) Where a judge refuses leave for an application under subsection 2, he may order that the application be transferred to the Divisional Court.

(4) An appeal lies to the Divisional Court from a final order of the High Court disposing of an application for judicial review pursuant to leave granted under subsection 2."

The power of the Divisional Court to entertain such applications and appeals is conferred by section 17(1) of *The Judicature Act* (as re-enacted by S.O. 1971, c. 57) which reads in part:

"17.—(1) The Divisional Court has jurisdiction to hear, determine and dispose of . . .

(*b*) applications for judicial review under *The Judicial Review Procedure Act, 1971*;

(*c*) all appeals from judgments or orders of judges of the High Court on applications for judicial review under *The Judicial Review Procedure Act, 1971*;

. . ."

Appeals from decisions of the Divisional Court on applications for judicial review are provided for by section 29(1) of *The Judicature Act* (as re-enacted by S.O. 1971, c. 57) which reads in part:

"29.—(1) Except where it is otherwise provided by statute and subject to the rules regulating the terms and conditions on which appeals may be brought, an appeal lies to the Court of Appeal from,

. . .

(*b*) any judgment or order of the Divisional Court, with leave as provided by the rules, on any question that is not a question of fact alone."

5. Form of application for judicial review.

By section 2(1) an application for judicial review may be made by way of an originating notice. The rules of court governing applications by originating notice therefore apply. Additional rules governing procedure in the Divisional Court may be made by the Rules Committee under *The Judicature Act* (R.S.O. 1970, c. 228, as amended by S.O. 1971, c. 57 and see p. 52 below).

Section 9(1) of the Act provides:

"9.—(1) It is sufficient in an application for judicial review if an applicant sets out in the notice the grounds upon which he is seeking relief and the nature of the relief that he seeks without specifying the proceedings enumerated in subsection 1 of section 2 in which the claim would have been made before the coming into force of this Act."

It is sufficient if the notice sets out

(a) the grounds upon which the applicant is seeking relief,
(b) the nature of the relief that he seeks.

6. Grounds for seeking relief on application for judicial review.

The grounds for seeking relief may be conveniently considered under the following three headings:

(1) Grounds for orders compelling performance of public duties,
(2) Grounds for orders prohibiting or restraining the exercise of powers of decision or for setting aside a decision, and
(3) Grounds for orders declaring regulations or directions unauthorized, or restraining action invading rights.

(1) Grounds for orders compelling performance of public duties

An order to compel the performance of a public duty can only be granted where the applicant would have been entitled to relief in proceedings for an order in the nature of mandamus. The Act makes no change in the grounds for obtaining such an order.

1 Can. Abr. pp. 96 et seq. Reid pp. 381 et seq.
13 C. E. D. pp. 146-156 de Smith pp. 559 et seq.

The significant change in practice is that a claim for an order of this kind may now be joined in the same application with claims for other relief that formerly could have been claimed only under other forms of proceedings.

(2) GROUNDS FOR ORDERS PROHIBITING OR RESTRAINING EXERCISE OF POWERS OF DECISION OR FOR SETTING ASIDE DECISIONS.

Grounds for obtaining these orders in the proceedings enumerated in section 2(1) were, with one exception, restricted to matters establishing that a decision was not authorized—that it did not fall within the power of decision and all limitations on its exercise. The exception was that in certiorari proceedings relief could be granted against an authorized decision on grounds of error of law on the face of the record.

The reason for the general restriction on the grounds upon which the court would grant relief is the rule that the courts have no power to entertain an appeal from a decision of a tribunal made within the powers conferred on it unless the right of appeal is expressly provided by statute. Since the courts could not entertain an appeal, their powers were limited on judicial review to determining whether a decision was authorized.

1 Can. Abr. pp. 96 et seq. Reid pp. 287 et seq.; 333
13 C. E. D. pp. 156, 169; 17 C. E. D. p. 329

The reasons for the exceptional ground in certiorari proceedings of error of law on the face of the record were historical.

The general power of the court on an application for judicial review to make an order prohibiting or restraining the exercise of a power of decision or setting aside a decision is not expanded by section 2(1) of the Act. Under that provision the court may only grant relief that the applicant would be entitled to under any one or more of the proceedings enumerated in it. To obtain relief he must establish grounds upon which such relief would have been granted.

Sections 2(2) and (3) enlarge these grounds. Error of law on the face of the record as a ground for relief from decisions reviewable in certiorari proceedings is extended to apply to all decisions made in the exercise of statutory powers of decision (see p. 47). In certain circumstances a decision of a tribunal may be set aside where there is no evidence to support its findings of fact (see p. 47).

Apart from these two changes, which confer powers in some ways analogous to those on appeals, an application for judicial review is not a proceeding in the nature of an appeal.

Grounds for relief recognized in the former proceedings may be enumerated as follows*:

(a) The statute conferring a power of decision on a tribunal is ultra vires and therefore ineffective to confer any power.

1 Can. Abr. p. 179 3 C. E. D. pp. 514, 515

*(The grounds for relief are listed in the order they are given in McRuer Report No. I, Vol. 1, Chapter 26, p. 242, and specifically pp. 247-266, where their rationale is discussed. See also Chapters 5 and 6, pp. 71 to 94).

(b) Members of the tribunal were invalidly appointed and it was not therefore properly constituted to exercise the power.

1 Can. Abr. p. 183	Reid pp. 249-250
2 C. E. D. p. 622	de Smith p. 407

(c) Preliminary facts, required by the statute conferring the power of decision to exist before the power arises, were absent.

1 Can. Abr. pp. 184-186	de Smith pp. 99 et seq.
Reid pp. 188, 249	

(d) Preliminary legal requirements, required by the statute conferring the power of decision to exist before the power arises, were absent—jurisdictional legal requirements.

1 Can. Abr. pp. 186-189	Reid pp. 188; 249
17 C. E. D. p. 324	de Smith pp. 99 et seq.

(e) The tribunal failed to comply with procedural requirements expressly imposed by statute.

Where *The Statutory Powers Procedure Act, 1971*, applies to a tribunal, a failure of the tribunal to comply with mandatory requirements of that Act will be a ground for an application for judicial review. Other mandatory procedural requirements may be imposed by the statute conferring the power of decision with a similar consequence.

1 Can. Abr. pp. 189-195	Reid pp. 58, 59; 63; 249
13 C. E. D. p. 156	de Smith pp. 126-130

(f) The tribunal failed to comply with procedural requirements of the procedural rules of natural justice.

The present status of the procedural rules of natural justice is discussed ante p. 23.

1 Can. Abr. pp. 195-215	Reid pp. 58 et seq.
13 C. E. D. p. 156	de Smith pp. 126-130

(g) Members of the tribunal were disqualified from properly applying their minds to making the decision because of bias.

1 Can. Abr. pp. 215-220	Reid pp. 219 et seq.
13 C. E. D. p. 156; 17 C. E. D. p. 344	de Smith pp. 231-263

(h) The matter decided by the tribunal was beyond the scope of its authority or jurisdiction.

1 Can. Abr. pp. 220-228	Reid p. 346 et seq.
17 C. E. D. p. 331	de Smith pp. 99-104

(i) In making its decision the tribunal applied principles or took into account considerations extraneous to those applicable or appropriate to be taken into account under the Act conferring the power of decision.

1 Can. Abr. pp. 228-232	Reid p. 346
13 C. E. D. p. 169	de Smith pp. 407, 408

(j) The tribunal did not arrive at its decision in the manner required by the statute, e.g., by a proper quorum or by the members failing to apply their own minds to the decision but delegating it.

1 Can. Abr. pp. 233; 267-268	de Smith pp. 281-292
Reid pp. 271-273	

(k) A party obtained the decision of the tribunal by fraud.

1 Can. Abr. pp. 233-234	Reid p. 347
2 C. E. D. p. 622	de Smith pp. 421, 422

As already indicated, one former ground for relief has been extended and one new ground has been added.

Under the former proceedings, the decision of a tribunal could be set aside in certiorari proceedings for error of law on the face of the record.

1 Can. Abr. pp. 234-236	Reid pp. 346; 361-363
2 C. E. D. p. 622	de Smith pp. 411-421

This power of the court has been extended by section 2(2) of the Act:

> "(2) The power of the court to set aside a decision for error of law on the face of the record on an application for an order in the nature of certiorari is extended so as to apply on an application for judicial review in relation to any decision made in the exercise of any statutory power of decision to the extent it is not limited or precluded by the Act conferring such power of decision."

The effect is that under the new application for judicial review, the court may set aside any decision in the exercise of a statutory power of decision for error of law on the face of the record whether or not the power would have been reviewable in certiorari proceedings. However the power of the court may be limited or precluded by a privative clause or other restrictive provision in the statute conferring the power of decision.

Section 2(3) of the Act adds a new ground for relief:

> "(3) Where the findings of fact of a tribunal made in the exercise of a statutory power of decision are required by any statute or law to be based exclusively on evidence admissible before it and on facts of which it may take notice and there is no such evidence and there are no such facts to support findings of fact made by the tribunal in making a decision in the exercise of such power, the court may set aside the decision on an application for judicial review."

The power of the court under this subsection is restricted to the review of decisions of tribunals made in the exercise of statutory powers of decision "where the findings of fact . . . are required by any statute or law to be based exclusively on evidence . . . and on facts of which it may take notice . . .". The following is a typical provision found in many statutes as a result of amendments made by *The Civil Rights Statute Law Amendment Act, 1971*:

> "The findings of fact of the tribunal pursuant to a hearing shall be based exclusively on evidence admissible or matters that may be noticed under sections 15 and 16 of *The Statutory Powers Procedure Act, 1971*."

Where a statute establishing a tribunal contains such a provision, the court on an application for judicial review may look at the record and if it contains

no evidence or facts of which notice may be taken to support a finding of fact made by the tribunal the court may set aside the decision. (See ante p. 21).

The effect of these provisions is to limit the rule established by *R.* v. *Nat Bell*, [1922] 2 A.C. 128, that in certiorari proceedings the court could not look at the evidence upon which a tribunal based its decision to see whether there was "any evidence" upon which the decision could be based.

For requirements as to records to be kept by tribunals to which *The Statutory Powers Procedure Act, 1971,* applies see ante p. 23.

(3) GROUNDS FOR ORDERS DECLARING REGULATIONS OR DIRECTIONS UNAUTHORIZED OR RESTRAINING ACTION INVADING RIGHTS.

Formerly relief could be sought by action for a declaration that a regulation or requirement or proposed action was unauthorized. An action for an injunction might also be brought to restrain action under such regulation or direction or the proposed action.

The grounds for obtaining relief in relation to such statutory powers are not changed by *The Statutory Powers Procedure Act, 1971.* Any ground that would invalidate the regulations or direction or render the taking of any such action unauthorized will afford grounds for relief.

For authorities on invalidity of regulations see,

1 Can. Abr. pp. 264-267
Reid pp. 255-271
de Smith pp. 57-58; 337-339

7. Nature of relief that may be claimed on application for judicial review.

(1) CLAIMS FOR RELIEF COMPELLING PERFORMANCE OF PUBLIC DUTY.

The claim for relief should be framed to claim an order analogous to an order in the nature of a mandamus.

(2) CLAIMS FOR RELIEF IN RELATION TO STATUTORY POWER OF DECISION.

Formerly the nature of the relief to be claimed was determined by the form of application or action in which it was claimed.

Where it was desired to prevent a tribunal from taking proposed proceedings in the exercise of a "judicial" or "quasi judicial" power of decision, an application was made for an order in the nature of a prohibition and the relief obtained was an order prohibiting the proceedings. Where it was desired to prevent a tribunal taking proposed proceedings in the exercise of a "purely administrative" power of decision an action for an injunction was brought and the relief obtained was a judgment granting an injunction restraining the tribunal from taking the proceedings. On the new application for judicial review no such distinction as to the form of relief need be drawn. All relief on an application for judicial review is granted by an "order". The relief claimed should be framed as a claim for an order prohibiting or restraining the proposed proceedings that will operate either as an order of prohibition or as an injunction, whichever would have been appropriate.

Where it was desired to attack a decision that the tribunal had already made or purported to make, if the power of decision was a "judicial" or "quasi judicial" power, an application was made for an order in the nature of certiorari and the relief obtained was an order quashing or setting aside the decision. If the power

of decision was a "purely administrative" power an action for a declaratory judgment was brought and the relief obtained was a judgment declaring the decision to be unauthorized or invalid. The distinction had a significant legal difference because the declaration did not operate to invalidate the decision as did an order quashing it. This anomalous distinction need no longer be observed in framing the claim for relief. Section 2(4) of the Act provides:

> "(4) Where the applicant on an application for judicial review is entitled to a judgment declaring that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, the court may, in the place of such declaration, set aside the decision."

Where a decision has been made, whatever former proceedings would have been appropriate the relief claimed in an application for judicial review should be framed to claim an order setting aside the decision.

(3) CLAIMS FOR RELIEF DECLARING REGULATIONS OR DIRECTIONS UNAUTHORIZED OR RESTRAINING ACTION INVADING RIGHTS.

Formerly the claim would have been put forward in an action for a declaration or injunction and the relief granted would have been a judgment making the declaration or granting the injunction. On an application for judicial review the relief should be framed as a claim for an order making the appropriate declaration or restraining taking the action.

8. Parties to application for judicial review.

The Act contains no general provision prescribing who may be parties to an application for judicial review. The law on *locus standi* remains unaltered. All persons who would formerly have been proper parties to proceedings for the relief claimed in proceedings enumerated in section 2 of the Act are proper parties to an application for judicial review for similar relief.

The law on *locus standi* differed to some extent under the former proceedings depending upon the nature of the proceedings. For example, in an action for an injunction brought by an individual to protect his rights, the proceedings were in the nature of a private action and only persons who might properly be parties to such an action could be parties to the proceedings. On the other hand, on an application for an order of prohibition, the public had an interest in preventing the abuse of powers of decision and persons who might take part in such applications did not need to have such a direct interest as in a private action. The courts will be faced with the problem of rationalizing the law having regard to the subject matter of the application.

Although the Act contains no general provision on parties, two specific rules are enacted.

Section 9(2) and (3) provide:

> "(2) For the purposes of an application for judicial review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power may be a party to the application.
>
> (3) For the purposes of subsection 2, any two or more persons who, acting together, may exercise a statutory power, whether styled a board or commission

or by any other collective title, shall be deemed to be a person under such collective title."

The effect of these provisions is that any person exercising a statutory power may be made a party to proceedings for judicial review of its exercise. Where the power is conferred on two or more persons they may collectively be made a party although not incorporated or otherwise constituting a legal entity. The technical objection under the former proceedings that an action for declaration or injunction could not be brought against an unincorporated group of persons is removed.

Section 9(4) provides:

"(4) Notice of an application for judicial review shall be served upon the Minister of Justice and Attorney General who is entitled as of right to be heard in person or by counsel on the application."

Formerly, actions for declarations could be brought against the Attorney General in certain circumstances and an application for judicial review may now be brought in such cases. The effect of subsection 4 is that in addition to those instances where the Minister of Justice and Attorney General is the proper party, he is required to be given notice and may intervene in all applications for judicial review.

9. Evidence on application for judicial review.

The general law on evidence to establish grounds for relief that would be admissible under the former proceedings remains unchanged.

1 Can. Abr. pp. 236-246 de Smith pp. 312-315
Reid pp. 325-329; 370-372

The new grounds for relief for error of law on the face of the record or for absence of evidence to support findings of fact permit the record now to be looked at to ascertain if such grounds exist. The Act also provides that where an application for judicial review is brought in relation to a statutory power of decision the person making the decision shall forthwith file in the court the record of the proceedings. Section 10 of the Act provides:

"10. When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application, the record of the proceedings in which the decision was made."

Applications for orders in the nature of certiorari envisaged two formal steps, first, an application for an order to a tribunal to produce its record to the court, and second, an application to quash the decision as disclosed by the record. In practice upon service of a notice of motion on an application for certiorari, a tribunal filed its record in court without waiting for a formal order to do so and the application was disposed of at one hearing. This practice is given statutory recognition on applications for judicial review by this section.

The contents of the record required to be kept by a tribunal to which *The Statutory Powers Procedure Act, 1971* applies are discussed ante p. 23.

10. Discretion of court to refuse relief.

Under the former proceedings, the court had some discretion to refuse to grant relief in the particular circumstances of a case even though the applicant had established grounds upon which relief might have been granted. The discretion of the court to do so is preserved by the Act. Section 2(5) and (6) provide:

> "(5) Where, in any of the proceedings enumerated in subsection 1, the court had before the coming into force of this Act a discretion to refuse to grant relief on any grounds, the court has a like discretion on like grounds to refuse to grant any relief on an application for judicial review.
>
> (6) Subsection 5 does not apply to the discretion of the court before the coming into force of this Act to refuse to grant relief in any of the proceedings enumerated in subsection 1 on the ground that the relief should have been sought in other proceedings enumerated in subsection 1."

Subsection 6 appears to have been included from an abundance of caution. Formerly, for example, the court had a discretion to refuse relief in an action for a declaration if it considered that certiorari proceedings were more convenient, beneficial and effective. Since the new application is comprehensive, no place for the exercise of such discretion exists.

A new discretion is conferred upon the court to refuse relief where the sole ground for relief established is a defect in form or technical irregularity and the court finds that no substantial wrong or miscarriage of justice has occurred. Section 3 provides:

> "3. On an application for judicial review in relation to a statutory power of decision, where the sole ground for relief established is a defect in form or a technical irregularity, if the court finds that no substantial wrong or miscarriage of justice has occurred, the court may refuse relief and, where the decision has already been made, may make an order validating the decision, notwithstanding such defect, to have effect from such time and on such terms as the court considers proper."

This section assumes that a defect is established that would invalidate a decision and entitle the applicant to relief but authorizes the court to refuse the relief. The defect might still be considered in other contexts to invalidate the decision. To avoid any question as to the effect of the decision, the court is authorized to validate it.

11. Ancillary powers of court.

Section 4 of the Act provides:

> "4. On an application for judicial review, the court may make such interim order as it considers proper pending the final determination of the application."

Where an application for judicial review is made, the court is empowered to stay proceedings or to restrain action to which the application relates pending final determination of the application.

Section 5 provides:

> "5. Notwithstanding any limitation of time for the bringing of an application for judicial review fixed by or under any Act, the court may extend the time for

making the application, either before or after expiration of the time so limited, on such terms as it considers proper, where it is satisfied that there are *prima facie* grounds for relief and that no substantial prejudice or hardship will result to any person affected by reason of the delay."

The Judicial Review Procedure Act, 1971 contains no general provision establishing a time limit for the bringing of an application for judicial review. Such time limits, if any, must be contained in the statute conferring the power or in the general law on limitations of actions. This provision authorizes the court in the circumstances specified in it to extend a time limit fixed in another statute.

12. Rules of practice and procedure.

Section 11 of the Act provides:

"11. Where not inconsistent with this Act, the rules of practice and procedure of the court apply to applications for judicial review and to appeals from final orders therein, and the Rules Committee established under *The Judicature Act* may amend such rules or make additional rules applicable thereto."

The Rules Committee also has power under section 114 of *The Judicature Act* (R.S.O. 1970, c. 228), as amended by *The Judicature Amendment Act, 1971,* (S.O. 1971, c. 57) to make rules concerning practice and procedure in the Divisional Court and reference should be made to such rules.

13. Transfers from High Court to Divisional Court.

The Act confers power on a judge of the High Court in certain circumstances to transfer to the Divisional Court actions for declarations or injunctions, or both, in which the exercise of statutory powers is an issue. Section 8 provides:

"8. Where an action for a declaration or injunction, or both, whether with or without a claim for other relief, is brought and the exercise, refusal to exercise or proposed or purported exercise of a statutory power is an issue in the action, a judge of the High Court may on the application of any party to the action, if he considers it appropriate, direct that the action be treated and disposed of summarily, in so far as it relates to the exercise, refusal to exercise or proposed or purported exercise of such power, as if it were an application for judicial review and may order that the hearing on such issue be transferred to the Divisional Court or may grant leave for it to be disposed of in accordance with subsection 2 of section 6."

The provision in section 2(1) that an application for judicial review may be brought to obtain relief that might be obtained in an action for a declaration or injunction in relation to the exercise of a statutory power does not prevent an action for such a declaration or injunction from being brought. Although an application for judicial review is summary and in general more expeditious and less costly than such an action, bringing an action might be thought to be of advantage to a person as a delaying tactic. The court is authorized in a proper case in effect to convert the action into an application for judicial review to be disposed of summarily.

14. Habeas Corpus proceedings.

Section 12(2) of the Act provides:

> "(2) Nothing in this Act affects proceedings under *The Habeas Corpus Act* or the issue of a writ of certiorari thereunder or proceedings pursuant thereto, but an application for judicial review may be brought in aid of an application for a writ of *habeas corpus*."

The effect of this provision is to preserve unchanged the special statutory form of certiorari provided for in sections 5 and 6 of *The Habeas Corpus Act* (R.S.O. 1970, c. 197). The scope of review in such proceedings was wider than under the ordinary common law certiorari.

PART IV

NOTE ON *FEDERAL COURT ACT*

The effect of the *Federal Court Act* (S.C. 1970-71, c. 1) is to remove all proceedings for judicial review with respect to federal boards, commissions or other tribunals from the jurisdiction of the provincial courts of Ontario. Proceedings for review of these boards or tribunals must be brought in the Federal Court.

A "federal board, commission or other tribunal" is defined by section 2(*g*) of the *Federal Court Act* to mean:

> "(*g*) any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of *The British North America Act, 1867*."

The relevant provisions of the Act dealing with the jurisdiction of the Federal Court are sections 18 and 28 which enact as follows:

> "18. The Trial Division has exclusive original jurisdiction
>
> (*a*) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal."
>
> . . .
>
> "28.—(1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or tribunal
>
> (*a*) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (*b*) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
>
> (*c*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.
>
> (2) Any such application may be made by the Attorney General of Canada or any party directly affected by the decision or order by filing a notice of the application in the Court within ten days of the time the decision or order was first communicated to the office of the Deputy Attorney General of Canada or to that party by the board, commission or other tribunal, or within such further time as the Court of Appeal or a judge thereof may, either before or after the expiry of those ten days, fix or allow.

(3) Where the Court of Appeal has jurisdiction under this section to hear and determine an application to review and set aside a decision or order, the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order.

(4) A federal board, commission or other tribunal to which subsection (1) applies may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Court of Appeal for hearing and determination.

(5) An application or reference to the Court of Appeal made under this section shall be heard and determined without delay and in a summary way.

(6) Notwithstanding subsection (1), no proceeding shall be taken thereunder in respect of a decision or order of the Governor in Council, the Treasury Board, a superior court or the Pension Appeals Board or in respect of a proceeding for a service offence under the *National Defence Act*".

The language of section 18 in giving "exclusive original jurisdiction" to the Federal Court has the effect of excluding the pre-existing jurisdiction of the provincial courts.

For a detailed discussion of these and related provisions of the *Federal Court Act* see the lecture entitled "Federal Administrative Tribunals in relation to the new Federal Court of Canada" by Gordon F. Henderson, Q.C., printed in The Special Lectures of the Law Society of Upper Canada, 1971, at p. 55.

MANUAL OF PRACTICE

ON ADMINISTRATIVE LAW
AND PROCEDURE IN ONTARIO

under

The Statutory Powers Procedure Act, 1971
The Public Inquiries Act, 1971
The Judicial Review Procedure Act, 1971
and Related Statutes

Department of Justice & Attorney General
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